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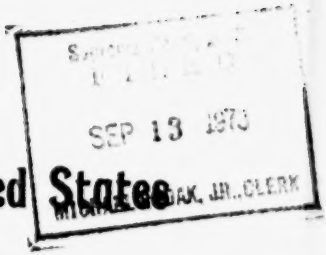

IN THE

Supreme Court of the United States

~~73-478~~

October Term, 1973.

ABRAHAM E. FREEDMAN,

Petitioner,

v.

JAMES M. MORRISSEY, JOSEPH PADILLA, and RALPH IBRAHIM, Individually and on Behalf of the Members of the NATIONAL MARITIME UNION OF AMERICA,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT.

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JAMES M. MORRISSEY, JOSEPH PADILLA, AND RALPH IBRAHIM, INDIVIDUALLY AND ON BEHALF OF THE MEMBERS OF THE NATIONAL MARITIME UNION OF AMERICA,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT.

To the Honorable, The Chief Justice and Associate Justices of the Supreme Court of the United States:

Petitioner, Abraham E. Freedman, respectfully prays that a Writ of Certiorari issue to review the final judgment of the United States Court of Appeals for the Second Circuit, entered on June 18, 1973, affirming the judgment of the United States District Court for the Southern District of New York, in the appeal docketed in the said Court of Appeals as No. 73-1082.

OPINIONS OF THE COURTS BELOW.

The opinion of the United States District Court for the Southern District of New York of January 11, 1972 is

reported at 336 F. Supp. 1107. The opinion of the United States District Court for the Southern District of New York dated June 29, 1972 is not officially reported but is printed in the Appendix hereto (A1). The opinion of the United States District Court for the Southern District of New York dated October 26, 1972 is reported at 351 F. Supp. 775 and is printed in the Appendix hereto (A17). The opinion of the United States Court of Appeals for the Second Circuit dated June 18, 1973 is not yet officially reported but is printed in the Appendix hereto (A35). A prior decision of the United States District Court for the Southern District of New York dated May 23, 1969, is reported at 302 F. Supp. 32. The decision of the United States Court of Appeals for the Second Circuit dated February 20, 1970, affirming in part and reversing in part the decision of the District Court of May 23, 1969 is reported at 423 F. 2d 393. Denials of the Petitions for Writs of Certiorari to review the prior decision of the Court of Appeals for the Second Circuit are reported at 399 U. S. 928 (1970), and 400 U. S. 826 (1970).

JURISDICTION.

The judgment of the Court of Appeals was entered on June 18, 1973. The jurisdiction of this Court is invoked under 28 U. S. C. Sec. 1254(1).

QUESTIONS PRESENTED.

1. Where the language and the legislative history of Section 501(a) of the Labor Management Reporting and Disclosure Act of 1959 make it clear that outside trustees are not covered by the Act, and where the Court of Appeals

for the Second Circuit stated that Section 501 was not intended to cover outside trustees did not the Court err in accepting jurisdiction under Section 501 so as to impose liability upon an outside trustee?

2. Where the Court of Appeals found that Section 501(a) was not intended to impose liability on an outside trustee, as that section was designed to deal with union officers, and in the instant action so held with regard to two outside trustees of equal status with trustee Freedman, but nonetheless imposed a surcharge on trustee Freedman under Section 501(a), while holding that Section 501(a) did not apply to outside trustees, did not the Court apply Section 501(a) unequally and improperly, and did it not thereby reach its determination as to Freedman without regard to due process of law?

3. Where, in an action under Section 501(a) of the Labor Management Reporting and Disclosure Act of 1959, the Court had determined that a union had made unauthorized payments to a pension plan, but where all the payments were returned to the union with interest and the union made whole for all of its losses, were not members who brought an action to surcharge the trustees of the pension plan without standing to sue?

4. Where a trust instrument, by its terms, is to be governed by the law of New York and where under that law a provision exempting a trustee from liability in the absence of wilful negligence or bad faith is the rule, did not the Court err in violating State law when it surcharged Freedman as a trustee without making a finding of wrongful misconduct?

STATEMENT OF THE CASE.

Plaintiffs, three members of the National Maritime Union, brought suit under Section 501 of the Labor-Management Reporting and Disclosure Act of 1959, 29 U. S. C. Section 501 to challenge payments made by the National Maritime Union to a pension plan to provide benefits for certain Union employees. Following a decision from the District Court and subsequent appeals, the payments that were held to have been invalid were returned to the Union with interest. Notwithstanding this repayment to the Union and notwithstanding the facts that plaintiffs were not beneficiaries of the pension plan nor could the Union recover anything by surcharging the trustees, the District Court permitted plaintiffs to bring an action against the trustees to surcharge them for payments previously made by them. The District Court subsequently surcharged Mr. Freedman, one of the trustees, an attorney and petitioner herein, $222,000 plus interest, for the amount of the pension paid to Mr. Perry, one of the employees held ineligible to receive the pension. The District Court's decision and the affirmance of the Court of Appeals violated well established principles of standing to sue, exceeded the jurisdictional requirements of Section 501, and denied petitioner due process.

The decisions of the courts below occurred within the following factual context. A trust agreement was entered into by the National Maritime Union with three trustees in 1952, establishing a fund to provide pensions for the Union's officers. The three trustees were the attorney, accountant, and pension fund advisor that headed the professional firms employed by the Union. A revision was made to the trust agreement in 1961, extending coverage of the pension plan to certain staff employees of the Union

including Mr. Perry, assistant to the president of the National Maritime Union. Petitioner became General Counsel of the National Maritime Union and a trustee of the pension plan in 1963.

An employment contract was negotiated with Mr. Perry in 1966 by Mr. Curran, president of the National Maritime Union. Mr. Perry was guaranteed employment with the National Maritime Union through 1974. At that time, Perry, who had been employed by the Union since 1954, would be eligible for a pension under the Officers' Pension Plan. The contract provided that if Mr. Perry were terminated or became incapacitated:

> ". . . In the event, however, of such termination, or if such incapacity should be substantial or total, Perry shall have the option to demand and receive at one time or over any period that he shall specify an amount equal to the said total salary, including contributions to the NMU Officers' Pension Plan and any other fringe benefits payable to National Officers which he would have received during the balance of the original term or any renewal or extension hereof."

This contract was submitted to the trustees. Following a three page opinion letter prepared by Mr. Freedman, which found the contract valid and binding as it related to Mr. Perry's pension rights, the trustees signed the contract.

Mr. Perry was fired in 1969. He immediately applied for payment of his pension benefits in a lump sum, as permitted by the Officers' Pension Plan, in order to obtain capital gains treatment as provided by the Internal Revenue Code. It was the opinion of Mr. Freedman that Mr. Perry was entitled to payment at that time and would not have to wait until the expiration of his contract in 1974.

One month after Mr. Perry was fired this action was instituted. The District Court granted summary judgment

for plaintiffs and directed an accounting and the return to the Union from the Pension Plan of all monies that had been paid to fund pensions for non-officers. Following unsuccessful appeals and an accounting, the money was immediately repaid by the trustees to the Union with interest.

The District Court permitted plaintiffs to bring an action against the trustees to surcharge them for pension payments previously made to Mr. Perry. The District Court found that all of the trustees were negligent in making the payments to Mr. Perry, but that they were not guilty of wilful misconduct. The District Court further found that Mr. Freedman acted "recklessly" in rendering his opinion that Mr. Perry was entitled to immediate payment of his pension. Despite the finding of *no* wilful misconduct and existence of the exculpatory clause of the trust exonerating the trustees from liability except for wilful misconduct, the District Court surcharged Mr. Freedman alone for the payment to Mr. Perry.

The Court of Appeals affirmed the decision of the District Court. It failed to discuss the threshold question of standing to sue despite the lengthy discussions in Briefs and at argument. Of greater import, the Court of Appeals implicitly ruled that Section 501 applied to Freedman, even though it did not apply to other similarly situated trustees.

In dealing with the effect of the trust exculpatory clause in view of amendments to Section 501, the Court stated:

> "Moreover, even if the effective date of the agreement were held to be subsequent to the enactment of Section 501(a), the plaintiffs could not prevail. The ban of Section 501(a) against all 'general exculpatory provisions by a labor organization in its constitution, by-laws or resolutions' does not apply to a standard trustee exculpatory clause of a trust agreement. Neither

the express language, the legislative history of the section or the purpose of the section indicate the desire of Congress to include trustee exculpatory provisions within the general ban on exculpatory provisions. The language of the section is clearly aimed at union officers, not trustees; nor can a trust be equated with 'a labor organization.' The purpose of Congress in enacting Section 501(a) supports this literal interpretation of the provision. The section was aimed at stopping the pilfering of union funds by union officers, not at the conduct of trustees acting in their capacity as fiduciaries.''

In effect, the Court's inconsistent opinion failed to recognize that if Section 501(a) was inapplicable to trustee exculpatory provision, it is inapplicable to the very trustee conduct for which Mr. Freedman was surcharged. Thus, the Courts below did more than make findings that were erroneous; they applied the law unequally so as to deprive Freedman of due process.

REASONS RELIED ON FOR ALLOWANCE OF THE WRIT.

I. The Court Below Violated the Jurisdictional Provisions of Section 501(a) of the Act When It Determined That Freedman, an Outside Trustee, Was Covered by the Act.

Section 501(a) of the Act provides:

> "The officers, agents, shop stewards, and other representatives of a labor organization occupy positions of trust in relation to such organization and its members as a group. It is, therefore, the duty of each such person, taking into account the special problems and functions of a labor organization, to hold its money and property solely for the benefit of the organization and its members and to manage, invest, and expend the same in accordance with its constitution and bylaws and any resolutions of the governing bodies adopted thereunder, to refrain from dealing with such organization as an adverse party or in behalf of an adverse party in any matter connected with his duties and from holding or acquiring any pecuniary or personal interest which conflicts with the interests of such organization, and to account to the organization for any profit received by him in whatever capacity in connection with transactions conducted by him or under his direction on behalf of the organization. A general exculpatory provision in the constitution and bylaws of such a labor organization or a general exculpatory resolution of a governing body purporting to relieve any such person of liability for breach of the duties declared by this section shall be void as against public policy."

It is clear that Section 501(a) applies to "officers, agents, shop stewards, and other representatives of a labor organization." Unless one falls within these categories, his conduct is not regulated by Section 501(a). Outside trustees cannot by any stretch of the imagination fall within one of these categories, and, accordingly are not within the purview of the Act. Since Mr. Freedman was such an outside trustee, (i.e. a trustee of the Pension Plan, not of the Union), the Courts below violated the jurisdictional provisions of Section 501(a) when they assumed jurisdiction to surcharge him.

A review of the legislative history of Section 501(a) confirms the fact that outside trustees cannot be deemed to fall within the purview of Section 501(a). Section 301 of McClellan Bill, S. 1137, 86 Cong. 1st Sess. (1959), 1 Legislative History 294-295, and Section 610 of the Kennedy-Ervin Bill, S. 1555, 86 Cong., 1st Sess. (1959), 1 Legislative History 567-577, specifically include officials of "a trust in which a labor organization is interested." See the Kennedy-Ervin Provision:

> "Every officer, agent, or other representative of a labor organization engaged in an industry affecting commerce, or of a trust in which such organization is interested, shall with respect to any money or other property in his custody or possession by virtue of his position as such officer, agent, or representative, have a relationship of trust to any such labor organization and the members thereof, or to any such trust and the beneficiaries thereof, and shall be responsible in a fiduciary capacity for such money or other property, notwithstanding any exculpatory clause or action purporting to exempt him from such responsibility."

Section 501(a) as passed did not contain the key language "or of a trust in which such organization is interested . . ."

The legislative history is not surprising in view of the linguistic structure of the Act. In Section 502(a) *specific reference* is made to all trustees, including outside trustees:

> "Every officer, agent, shop steward, or other representative or employee of any labor organization (other than a labor organization whose property and annual financial receipts do not exceed $5,000.00 in value), or of a trust in which a labor organization is interested, who handles funds, or other property thereof shall be bonded for the faithful discharge of his duties . . . ."

Had Congress intended to subject outside trustees to Section 501(a), the phrase "of a trust in which a labor organization is interested" would have been set forth. To find otherwise would be to act in complete disregard of Congressional intent.

In Section 3q, the definition of "officer, agent, shop steward, or other representative" appears. Outside trustees are conspicuously absent from that definition:

> " 'Officer, agent, shop steward, or other representative', when used with respect to a labor organization, includes elected officials and key administrative personnel, whether elected or appointed (such as business agents, heads of departments or major units, and organizers who exercise substantial independent authority), but does not include salaried non-supervisory professional staff, stenographic, and service personnel."

Again, Congress left out the language "of a trust in which a labor organization is interested." If outside trustees were meant to be included in the definition that specific language would have been inserted into the Act.

The use of "officer, agent, shop steward, and other representative of a labor organization" in other portions of the Act conclusively establishes that outside trustees are not included within the definition of Section 3q. Situations covered by Section 203(a)(1), which focuses on employer payments, loans, etc. to any "officer, agent . . ." are totally inappropriate to outside trustees. The same is true with regard to Sections 505 and 609 of the Act. The consistent expressed intention of Congress to exclude outside trustees from the class of "officers, agents, shop stewards, or other representatives" in other parts of the Act, makes it abundantly clear that they were excluded likewise from Section 501(a). See *Tucker v. Shaw,* 308 F. Supp. 1 (E. D. N. Y. 1970). It should be observed that were such outside trustees meant to be included within Section 501(a), there would have been no need for the numerous attempts by members of Congress to pass legislation imposing federal fiduciary duties upon trustees of private pension plans. See S. 4, 93rd Cong., 1st Sess., Section 501 et seq. (1973); S. 3598, 92nd Cong., 2nd Sess., Section 201 et seq. (1972); S. 2, 92nd Cong., 1st Sess., Section 402 (1971). The thrust of Congressional review is that federal fiduciary duties are not applicable to outside trustees of union pension plans. See Subcommittee on Labor of House Committee on Labor and Public Welfare, Interim Report of Activities of the Private Welfare and Pension Plans Study, 1971 S. Rept. 92-634, 92nd Cong., 2nd Sess. at 91-99 (1972).

Further, the Court of Appeals for the Second Circuit itself reached this conclusion when, in dealing with the effect of the exculpatory provisions of the trust agreement, it stated:

> "Moreover, even if the effective date of the agreement were held to be subsequent to the enactment of Section 501(a), the plaintiffs could not prevail. The ban of Section 501(a) against all 'general exculpatory provisions by a labor organization in its constitution, by-laws or resolutions' does not apply to a standard trustee exculpatory clause of a trust agreement. *Neither the express language, the legislative history of the section or the purpose of the section indicate the desire of Congress to include trustee exculpatory provisions within the general ban on exculpatory provisions. The language of the sections is clearly aimed at union officers, not trustees; nor can a trust be equated with 'a labor organization.' The purpose of Congress in enacting Section 501(a) supports this literal interpretation of the provision. The section was aimed at stopping the pilfering of union funds by union officers, not at the conduct of trustees acting in their capacity as fiduciaries.*" (Emphasis supplied.)

The Court, by its very language, admitted that neither the language nor intent of the drafters of this legislation was to apply Section 501 to an outside trustee. Accordingly, the legislative history of the Act, the language of the Act, and the interpretation of this statute by the Court of Appeals for the Second Circuit makes it abundantly clear that Section 501 does not afford either a jurisdictional or substantive base upon which to make a determination against Freedman in his capacity as an outside trustee.

II. Where the Court of Appeals for the Second Circuit Found That Section 501(a) Was Not Intended to Impose Liability on an Outside Trustee as That Section Was Designed to Deal With Union Officers, and Therefore, Stated That Two Outside Trustees of Equal Status With Trustee Freedman Were Not Covered by the Act, the Court Applied Section 501 Unequally and in a Manner Which Denied Trustee Freedman Due Process When It Nonetheless Imposed Liability Upon Him as an Outside Trustee Under Section 501(a).

One need look no further than the previously quoted language of the Second Circuit Court of Appeals to reach the conclusion that the acts of trustee Freedman were not within the literal or intended scope of Section 501(a). The plain meaning of the Act limits its effect to conduct involving the *fiduciary* relationship of "officers, agents, shop stewards, and other representatives to the Union. It is clear

> ". . . that it (Section 501(a)) is not a catchall provision under which Union officials can be sued on any ground of misconduct with which the plaintiffs choose to charge them." *Gurton v. Arons*, 339 F. 2d 371 (2d Cir. 1964).

See also *Coleman v. Brotherhood of Railway & S. S. Clerks, etc.*, 340 F. 2d 206 (2d Cir. 1965).

The evidence below was undisputed that trustee Freedman is an "outside-trustee." He was not an "officer, agent, shop steward, or other representative" of the National Maritime Union required by the very terms of Section 501(a).

In holding that Trustees Segal and Karchmer could not be surcharged for the Perry payment, the District Court held that "(t)he Agreement and Declaration of Trust

specifically protects them from liability from the acts of any other trustees." The Court of Appeals for the Second Circuit affirmed this holding of a District Court *but in so doing stated:*

> "The ban of Section 501(a) against all 'general exculpatory provisions by a labor organization in its constitution, by-laws or resolutions' does not apply to a standard trustee exculpatory clause of a trust agreement . . . *The language of the section is clearly aimed at union officers, not trustees; nor can a trust be equated with a 'labor organization'.* . . . The section was aimed at stopping the pilfering of union funds *by union officers, not at the conduct of trustees acting in their capacity as fiduciaries.*" (Emphasis supplied.)

In short Trustees Segal and Karchmer could not be surcharged because Section 501(a) does not apply to the conduct of trustees acting in their capacity as trustees.

Yet, the Court of Appeals affirmed the surcharge imposed upon Trustee Freedman. The effect of this holding is to say that Section 501(a) does not apply to actuaries who are trustees nor to certified public accountants who are trustees, but it does apply to attorneys who are trustees of Pension and Welfare funds. The utter absurdity and illogic of this result is apparent. Such an interpretation of Section 501(a) results in an unequal application of the language of the Act to Freedman as distinguished from the other trustees and if permitted to stand, results in a deprivation of Freedman's rights and property without due process of law.

Congress made no distinction between lawyer and non-lawyer trustees when enacting Section 501(a); rather, *as correctly stated by the Court below,* the determinant of Section 501(a) liability is the status of the trustee within

the Union. An "insider" trustee may be liable pursuant to Section 501(a); an "outsider" can never be. In the instant action, all three trustees were "outsiders." All three trustees, therefore, were insulated from Section 501(a) liability. All three trustees were entitled, as a matter of law, to the same judicial construction of Section 501(a).

By holding that Section 501(a) applies only to union insiders, the Court of Appeals was required to reverse the decision of the District Court vis-à-vis a surcharge of trustee Freedman. The failure of the Appeals Court to so act was obviously improper. If this disparate result is permitted to stand, Freedman will be judged by a different standard from the other trustees, resulting in his being surcharged without equal application of the law and without due process.

III. In Assuming Jurisdiction to Surcharge Trustees, the Court Below Violated Both the Express Statutory Language of Section 501 and the Numerous Decisions of This Court Which Established That Unless Otherwise Provided by Statute, Standing to Sue Exists Only Where There Is "Injury in Fact."

As this Court frequently has recognized, the underlying principle of law is that absent specific statutory authority, standing to sue depends upon the plaintiff's establishing that the challenged action caused him injury in fact. See *Sierra Club v. Morton*, 405 U. S. 727, 31 L. Ed. 2d 636 (1972); *Flast v. Cohen*, 392 U. S. 83, 20 L. Ed. 2d 947 (1968). In *Flast*, at page 961, the Court stated:

> "Despite the complexities and uncertainties, some meaningful form can be given to the jurisdictional limitations placed on federal court power by the con-

> cept of standing. The fundamental aspect of standing is that it focuses on the party seeking to get his complaint before a federal court and not on the issues he wishes to have adjudicated. The 'gist of the question of standing' is whether the party seeking relief has 'alleged such a personal stake in the outcome of the controversy as to assure that concrete adverseness which sharpens the presentation of issues upon which the court so largely depends for illumination of difficult constitutional questions.' Baker v. Carr, 369 U. S. 186, 204, 7 L. Ed. 2d 663, 82 S. Ct. 691 (1962). In other words, when standing is placed in issue in a case, the question is whether the person whose standing is challenged is a proper party to request an adjudication of a particular issue and not whether the issue itself is justiciable."

An allegation of "injury" by itself is insufficient to form a basis for "standing." It is the party seeking judicial intervention that must have suffered the alleged injury. *Sierra Club v. Morton, supra.*

Even cursory review of the factual context in which this litigation has proceeded renders the conclusion unavoidable that any "injury in fact" to the plaintiffs is logically and legally impossible. Following the District Court's decision in *Morrissey v. Curran*, 302 F. Supp. 32, 35 (S. D. N. Y. 1969), an accounting was held and the monies claimed to have been improperly paid to the trustees of the National Maritime Union Officers' Pension Plan were immediately repaid with interest to the trustees of the pension plan of the union. As soon as repayment was effected and the Union was made whole for any alleged losses, the injury ceased to exist. The plaintiffs were not beneficiaries of the pension plan. The money had been

repaid. The Union itself was insulated from liability for additional contributions to the pension plan by Article IV, Section 3 of the trust agreement establishing the pension plan:

> "Liability for the payment of the pensions and benefits provided for under the Pension Plan adopted pursuant to the within Agreement and Declaration of Trust and any other liability arising under or out of this Agreement *shall be limited exclusively to the assets of the Trust Fund,* and in the event that such assets are at any time insufficient to provide for the payment of any pension or benefit payments due under the Pension Plan, or any other such liability, no liability for the payment thereof shall attach to or may be asserted against the Trustees." (Emphasis supplied.) [1]

The absence of a real injury precludes plaintiffs from obtaining the necessary "standing" to bring this action.

This action was brought pursuant to the provisions of Section 501(b):

> "When any officer, agent, shop steward, or representative is alleged to have violated the duties declared in sub-section (a) . . . such member may sue such officer, agent, shop steward, or representative . . . to recover damages or secure an accounting or other appropriate relief for the benefit of the labor organization . . . ."

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1. The District Court erroneously assumed that the union might be liable for additional contributions to the plan if the fund were impaired by reason or improper payments, and predicated plaintiffs' standing to seek to surcharge defendants on this erroneous assumption. However, under Article IV, Section 3 of the trust agreement, it is clear that there could be no such liability on the part of the union for additional payments, and therefore, plaintiffs could not possibly have had standing on this theory.

Section 501(b) focuses on relief "for the benefit of the labor organization." It makes no reference to "a trust in which a labor organization is interested", in contrast to Section 502(c) of the Act, which makes specific reference to such an entity through this very explicit language. It is clear that Congress in Section 501(b) was providing relief "for the benefit of the labor organization."

It must be remembered that a Federal District Court is not a Court which has general supervision over the administration of trust estates as do surrogate courts or orphans' courts, which have such jurisdiction by virtue of State law. The Federal District Courts are statutory courts with a prescribed, delegated and limited jurisdiction, which never has included the authority of surrogate or orphans' courts. There is nothing in the Labor Management Reporting and Disclosure Act of 1959 or its legislative history which even remotely suggests that Congress, in enacting the statute, intended Federal Courts to engage in the day-to-day administration of trusts and pension plans. See *Tucker v. Shaw,* 308 F. Supp. 1, 4 (E. D. N. Y. 1970). The assumption by the District Court that it had inherent jurisdiction to enforce the trust, even though such action would not result in any benefit to the labor organization, is contrary to the explicit statutory language and patently erroneous.

The concept of standing to sue was developed to insure that the judicial power would be called upon only to remedy "injury in fact." *Sierra Club v. Morton, supra; Flast v. Cohen, supra.* Here, as demonstrated above, the payments made by the trustees caused no "injury in fact" to the plaintiffs or to the Union. The plaintiffs had no cause of action against the trustees, and no standing to seek to surcharge them. It follows that the Courts below, in granting plaintiffs standing and in subsequently surcharging petitioner, exceeded both the jurisdictional and substantive as-

pects of Section 501 of the Labor Management Reporting and Disclosure Act. For this reason alone, certiorari should be granted and the decision below reversed.

IV. Where a Trust Provision Exempts a Trustee From Liability in the Absence of Wilful Negligence, Self-Dealing, or Bad Faith, the Decision Below Surcharging Petitioner on the Basis of His Rendering of a Legal Opinion Without Finding Wilful Negligence, Self-Dealing or Bad Faith Is in Direct Conflict With Controlling State Appellate Decisions, Which Decisions Are Binding.

In surcharging petitioner, the courts below adopted a standard for trustee's liability which is in direct conflict with controlling appellate decisions of the courts of the State of New York. By the terms of the trust agreement, the law of New York was to govern the administration of the trust.

The trust agreement establishing the NMU Officers' Pension Plan specifically provides that all questions pertaining to its validity, construction or the acts of the parties thereunder, shall be determined in accordance with the laws of the State of New York.[2] The trust agreement further provides that no trustee shall be liable for any loss sustained by the trust fund, unless such loss is due to the trustee's wilful misconduct.[3] The courts of New York have

2. Article V, Section 5 of the trust agreement provides:

"5. This agreement and the Trust Fund and Pension Plan established hereunder and pursuant hereto have been executed in the State of New York and all questions pertaining to the validity or construction of this instrument and of the acts or transactions of the parties hereto shall be determined in accordance with the laws of the State of New York."

3. The trust agreement provides, in Article III, Section C, paragraphs 4 and 5 as follows:

"4. The Trustees shall not be liable for the making, retention, or sale of any investment or reinvestment as made by

held that this type of exoneration clause is enforceable in the absence of "wilful negligence, self-dealing or bad faith," *Matter of Cowles,* 22 A. D. 2d 365, 378, 255 N. Y. S. 2d 160, 174 (1st Dept. 1965), *aff'd,* 17 N. Y. 2d 567, 268 N. Y. S. 2d 327 (1966); *cf., In re City Bank Farmers Trust Co.,* 270 App. Div. 572, 576, 61 N. Y. S. 2d 484, 487 (1st Dept. 1946); *Matter of Clark's Will,* 257 N. Y. 132, 177 N. E. 397 (1931); *Crab v. Young,* 92 N. Y. 56.

In order to be guilty of "wilful misconduct," there must be a finding that the trustee engaged in "intentional wrongdoing." The test is stated in *Collins v. Storer Broadcasting Co.,* 217 Ga. 41, 49, 120 S. E. 2d 764, 769-770 (1961), as follows:

> "A creator of a trust has the right to make a provision in the instrument creating the trust for the exemption of the trustee from personal liability. Anderson v. Bean, 272 Mass. 432 (172 NE 647, 72 ALR 959); Restatement, Trusts 2d, 516, Sec. 222(1). The term 'wilful default' within the meaning of a provision in the instrument creating a trust making each trustee liable only for his own wilful default has been held to mean 'more than involuntary, inadvertent, negligent, mistaken, careless or accidental default. *It means an intentional designing failure to do or not to do something required—an affirmative wrong.*' Thompson v. Hays, 11 F. 2d 244; New England Trust Co. v. Paine, 317 Mass. 542 (59 NE 2d 263, 158 ALR 262). See North

---

3. (Cont'd.)
them, as herein provided, nor for any loss to, or diminution of the Fund, except due to their own wilful misconduct.

"5. . . . No Trustee shall be liable for any action taken or omitted by him unless such act or omission is the result of wilful misconduct, nor for the acts of any agent, employee or attorneys connected by the Trustees with reasonable care, nor for any act or omission of any other Trustee."

Adams National Bank v. Curtiss, 278 Mass. 471 (180 NE 217, 83 ALR 607, 620)." (Emphasis supplied.)

In the case at bar, there was neither evidence of intentional wrongdoing nor was there a finding by the Court below that Freedman was guilty of such conduct. Accordingly, the necessary ingredient to take Freedman outside of the protective ambit of the trust provision exempting a trustee from liability is absent. Absent such finding by the court below, the protection afforded the other trustees by the trust agreement applies to Freedman.

What is more, the evidence could not support a finding of such conduct as would result in a surcharge of Freedman. Freedman's opinion turned upon the construction he gave to "employment" in Article VI, Section 3 of the Pension Plan:

> "A Participant shall be given credit for Covered Employment . . . for the period of time he is employed by the NMU in one of the capacities listed in Article I, Sections 5, 6 and 7 of this Plan, and for which employment he receives a salary from the NMU."

For his construction of the period of time during which someone is "employed," Mr. Freedman looked to more than the period during which services were actually rendered; he looked to the period of the entire employer-employee relationship. In doing so, he was amply supported.

In interpreting the provisions of an analogous retirement insurance program, this Court also looked beyond the period during which services were actually rendered. In *Social Security Board v. Nierotko,* 327 U. S. 358 (1946), the Court held that an employee who was awarded two and one-half years' back pay by the NLRB, was entitled to

receive two and one-half years' credit toward his social security benefits. The Social Security Board argued to the Court that since the employee had not worked for that period, he was not entitled to credit. Credit, the Board argued, could only be given for "employment," which the Social Security Act *defined* as "service performed." 327 U. S. at 364. But the Supreme Court concluded that even "service performed"

> "means not only work actually done but the entire employer-employee relationship for which compensation is paid for the employee by the employer." 327 U. S. at 365-366.

See also *Kore v. Celebrezze*, 342 F. 2d 638 (7th Cir. 1965); *Purdy v. Ribicoff*, 198 F. Supp. 812 (D. N. J. 1961).

Use of the "entire relationship" yardstick is particularly apt in construing the provisions of a pension program. Unlike social security, pensions are intended to do more than just provide security for old age. *United States v. Silk*, 331 U. S. 704, 711 (1947). Insofar as the employer is concerned (particularly in non-contributory plans such as the instant one), pensions are a "means of financing the removal of the inefficient" and a "means of inducing long service and employee identification with the employer." M. Bernstein, The Future of Private Pensions 10-11 (1964). In light of such relationship-directed goals, it would seem no less reasonable here than it was in *Nierotko* to look to the "entire relationship" in order to construe "employment."

Indeed, it was most reasonable to do so here. Perry was induced in 1966 to enter into an employment contract which had, as its only source of security, the guarantee of actual employment through 1974 (the year when he would normally qualify for a pension), or, in the event of his

termination prior to that time, the guarantee of the equivalent of actual employment. Had Perry been actually employed through 1974, he would have received salary, benefits, and credit for covered employment through that time. Were Perry discharged during this time, Paragraphs 3 and 4 of the Perry agreement were intended to provide him with nothing less. Further, if Perry so chose, he could receive his salary and other benefits through 1974, at the time of his termination.

The salary and benefits were payable upon demand pursuant to paragraph 3, which provides in part:

> "In the event . . . of such termination . . . Perry shall have the option to demand and receive at one time or over any period that he shall specify an amount equal to the said total salary [through 1974], including contributions to the NMU Officers Pension Plan and any other fringe benefits payable to National Officers which he would have received during the balance of the original term [through 1974] . . . ."

Credit for covered employment was guaranteed pursuant to paragraph 4, which provided in part:

> "For the purposes of determining Perry's entitlement to participation in and benefits from, the NMU Officers Pension Plan, the parties recognize, understand and agree that Perry shall be deemed to be a 'Participant' in 'Covered Employment' (as defined in the said Plan) during the full period of the original term of this Agreement [through 1974] . . . ."

Paragraph 4—read in conjunction with paragraph 3's provision that Perry could demand the *immediate* payment to the pension plan of all the union's contributions through

1974—makes this much clear: The parties to the employment agreement (the members of the National Council, Perry, and the trustees) believed that Perry could demand immediate credit for covered employment through 1974. Were this not the case, a demand for immediate payment of the contributions would have been functionally useless.

In light of these facts, it was neither arbitrary nor capricious for Mr. Freedman to recommend that Perry, at the time of this termination, receive credit for "employment" under Article VI, Section 3 of the pension plan through 1974.

Insofar as the NMU-Perry employer-employee relationship was concerned, Perry's "employment" was employment through 1974. *In view of that alone,* since Perry would never render a day's more service for the NMU after 1969, it made little sense to delay credit for that employment beyond the date of Perry's termination.

But there was more. Upon his termination, Perry's employer intended to (and did) give to Perry all the indicia of employment through 1974—his salary and vacation pay (without any discount whatsoever) and the pension contributions on his behalf. In view of that, it made no sense whatsoever to delay credit for the employment.

No matter how one characterizes petitioner's behavior, it cannot be determined wilful, self-dealing or bad faith. The wrongs with which the District Court charged Freedman—haste and conflict of interest—are neither surchargeable offenses nor are they supported by the Record.

No one has denied that Freedman wrote the Perry agreement two and one-half years before he rendered his 1969 opinion. Additionally, the Record is clear that after the agreement was entered into, the trustees held many conversations with Freedman about the legal effect of paragraph 4 of the agreement and about the trustees' decision to be bound thereby.

In fact, the plaintiffs below submitted in their case the 1966 opinion which Mr. Freedman rendered to the trustees in response to their inquiries, which opinion was the very cornerstone of his 1969 decision. Mr. Freedman concluded there that regardless of whether Perry was terminated before 1974, he would be entitled to "status as a covered employee" through that date.

It is quite apparent that those familiar with the Perry agreement not only shared Freedman's opinion, but totally understood its implications, in the event that Perry requested a lump-sum payment upon his termination.

Joseph Curran, president of the union, well understood the implications, too. On December 18, 1968, after he fired Perry for the first time, Curran instructed the union controller to pay $41,250.01 to the pension fund, "the monies due in accordance with the employment contract agreement with the National Maritime Union of America and William Perry."

Finally, Segal, the actuary, understood the implications, too. A portion of his uncontradicted testimony reads as follows:

> "Q. When you received this letter [the 1969 opinion of Mr. Freedman] the same day you had this conversation, did you in any way in your own mind question the speed or haste with which that letter had been sent or received by you?
>
> "A. I did not . . . . [I]t seemed to me at the time a perfectly routine matter. The contract had previously been discussed more than two years earlier.
>
> "Q. He had opined on it in 1966, had he?
>
> "A. Yes, he had."

What becomes clear from these excerpts and from the record as a whole is that Mr. Freedman, his fellow trustees, the president of the union (if not the rest of the National

Office), and Perry well understood the implications of the NMU-Perry employer-employee relationship in 1966, in 1968, and in 1969 before the call to Mr. Freedman was ever made. The problem raised by the events of Perry's termination simply was not new.

When one has a two and one-half year intimacy with a problem, even if the answer is wrong, it is neither reckless nor unreasonable to give that answer within five minutes, let alone within an hour. As the Court of Appeals for the Second Circuit recently had occasion to say:

> "[S]peed is not necessarily inconsistent with careful consideration, any more than delay is a guaranty of a wise decision." *United States v. Needles,* Docket No. 72-1704 (January 11, 1973).

Further, the District Court wrongly condemned Mr. Freedman for acting simultaneously as a trustee, counsel to the trustees and counsel to the National Maritime Union. Article III, Section C(5), of the trust agreement states that counsel to the trustees may be a trustee also. Historically, counsel to the union was a counsel-trustee under the trust agreement. Under such circumstances, it was reasonable for Mr. Freedman to assume the position he did.

Moreover, when he rendered his 1969 opinion, Mr. Freedman labored under no conflict. He did not advise the union. The union itself, a month before, made its contributions to the pension fund through 1974. Mr. Freedman's only advice was given to the trustees. He advised them what credit Perry was entitled to. There was no conflict of interest of any type existent.

CONCLUSION.

The Courts below erroneously interpreted Section 501 of the Labor Management Reporting and Disclosure Act of 1959 so as to assume jurisdiction over the conduct of an outside trustee, despite the fact that the language of the Act, its legislative history and the finding of the Court of Appeals itself make it clear that Section 501 was not intended to deal with outside trustees. The Court then aggravated this misinterpretation of Section 501 by applying it unequally to Freedman at the same time that it stated it did not apply to trustees who were in an equal position with Freedman. The Court further misinterpreted Section 501 in determining that the plaintiffs below had standing to sue. The Court below refused to follow the law of New York, in surcharging petitioner on the basis of his rendering of a legal opinion, which surcharge was in direct conflict with controlling State Appellate decisions. Finally, it is impossible to characterize petitioner's behavior as being wilful, self-dealing, reckless or in bad faith. On the contrary, petitioner's advice as to the interpretation of the contract was given after a two and one-half year intimacy with the contract which he himself had drawn, and the problems involved with the contract. His decision was well supported by the verbiage of the contract and judicial precedent.

In recent years, there has been an ever-increasing volume of litigation under Section 501 of the LMRDA, without, however, a definitive ruling by this Court on the nature and scope of the liability imposed by the statute. The decision below now has extended the scope of the statute to outside private trustees notwithstanding clear statutory language and legislative history to the contrary, and has imposed an uneven and discriminatory standard of

liability which, unless corrected by this Court, may be applied to the vast volume of litigation now being brought under the statute. Accordingly, it is imperative that these erroneous actions by the Court below be corrected at this time.

For the foregoing reasons, it is respectfully submitted that this Petition for Writ of Certiorari should be granted.

Respectfully submitted,

MARVIN I. BARISH,
WILFRED R. LORRY,
Attorneys for Petitioner.

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IN THE

Supreme Court of the United States

73-478

October Term, 1973.

ABRAHAM E. FREEDMAN,

Petitioner,

v.

JAMES M. MORRISSEY, JOSEPH PADILLA, and RALPH IBRAHIM, Individually and on Behalf of the Members of the NATIONAL MARITIME UNION OF AMERICA,

Respondents.

APPENDIX TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT.

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Appendix.

DISTRICT COURT OPINION, JUNE 29, 1972.

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

69 CIV. 442.

JAMES M. MORRISSEY, JOSEPH PADILLA, RALPH IBRAHIM, INDIVIDUALLY AND ON BEHALF OF THE MEMBERS OF THE NATIONAL MARITIME UNION OF AMERICA,

Plaintiffs,

—against—

JOSEPH CURRAN, SHANNON WALL, WILLIAM PERRY, MARTIN SEGAL, ABRAHAM E. FREEDMAN AND LEON KARCHMER,

Defendants.

Appearances:

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MEMORANDUM.

BONSAL, *D. J.*

In the earlier proceedings in this action it has been determined that the 1960 constitution of the National Maritime Union of America ("NMU") did not authorize the inclusion of non-officers of NMU in the NMU Officers Pension Plan ("the Pension Plan"), and that NMU was entitled to recover from the Trustees of the Penson Plan all amounts paid by NMU into the Pension Plan for the account of non-officers, plus interest. *Morrissey v. Curran,* 302 F. Supp. 32 (S. D. N. Y. 1969), *aff'd in part, rev'd in part,* 423 F. 2d 393 (2d Cir.), *cert. denied,* 399 U. S. 928 (1970), 400 U. S. 826 (1970), *on remand,* 336 F. Supp. 1107 (S. D. N. Y. 1972). Accordingly, on February 18, 1972, judgment was entered in favor of NMU against the Pension

Plan in the amount of $674,222.60 (presenting $520,283.38 paid into the Pension Plan for the account of non-officers, plus interest in the amount of $153,939.22), which judgment has been paid. Judgment was also entered on February 18, 1972 in favor of the Pension Plan against the defendant William Perry ("Perry") a non-officer, in the principal amount of $222,200. (the amount of the lump sum pension paid to him), plus interest in the amount of $41,107., or a total of $263,307. This judgment has not been paid. The court has been advised that the Pension Plan has instituted supplementary proceedings to collect the judgment.

Plaintiffs now seek to surcharge the defendants Curran and Wall, officers of NMU, and defendants Segal, Freedman and Karchmer, Trustees of the Pension Plan, with respect to amounts paid by the Pension Plan to non-officers of NMU.

In its Memorandum filed January 11, 1972, the court stated that the plaintiffs may "notice a hearing to determine the personal liability, if any, of the defendant trustees (of the Pension Plan), Freedman, Segal and Karchmer, and officers [of NMU], Curran and Wall, to NMU for the monies which the Pension Plan has paid out to non-officers and which it is unable to recoup." (336 F. Supp. at 1111). The hearing was held on April 13, 14 and May 1, 1972, at which plaintiffs presented their evidence. At the conclusion of the hearing, the defendants moved to dismiss, pursuant to Rule 41(b), F. R. Civ. P., on the ground that plaintiffs have shown no right to relief.

Plaintiffs are members of NMU, suing on behalf of all of its members under Section 501 of the Labor-Management Reporting and Disclosure Act of 1959 ("LMRDA"), 29 U. S. C. § 501. Defendant Joseph Curran ("Curran") is the President of NMU. Defendant Shannon Wall ("Wall") is the Secretary-Treasurer of NMU. Defendants Martin

Segal ("Segal"), Abraham E. Freedman ("Freedman") and Leon Karchmer ("Karchmer") are the Trustees of the Pension Plan pursuant to an Agreement and Declaration of Trust of December 29, 1952 as subsequently amended. Freedman is also General Counsel of NMU.

Perry was Assistant to the President of NMU, and in prior proceedings it has been determined that he was not an officer of NMU entitled to participate in the Pension Plan. (302 F. Supp. 32, as affirmed by the Court of Appeals, 423 F. 2d 393.) While there were several other non-officers who received payments under the Pension Plan,[1] the evidence offered by plaintiffs at the hearing primarily concerned Perry. The evidence established that on January 16, 1969, NMU paid Perry $104,595.16 to cover salary, severance pay and vacation pay through October 20, 1974, and that, on the same day, the Pension Plan delivered to Perry a post-dated check (January 20, 1969) in the amount of $222,200. The evidence at the hearing showed, in relevant part:

STATEMENT OF FACTS *(Perry)*.

Perry had been employed by NMU since 1954, and as Assistant to the President since 1958. On August 2, 1966, he entered into an employment contract with NMU which provided that he would continue in the employ of NMU to serve as Assistant to the President until October 30, 1974. Paragraph 3 of the contract provided.

> "In the event that this Agreement or Perry's employment should be terminated, with or without cause, price to the expiration date hereof . . . Perry shall be entitled to continue to receive his said salary

1. Sarah Laderhandler .... $ 9,201
   James Tevan ..... $ 12,799
   Sophia Tevan ..... $ 11,561
   Irving Brauch $115,510

> in full, including contributions to the NMU Officers Pension Plan and any other fringe benefits payable to the National Officers as under paragraph 2 hereof, during the balance of the term hereof . . . In the event, however, of such termination . . . Perry shall have the option to demand and receive at one time . . . an amount equal to the said total salary, *including contributions to the NMU Officers Pension Plan* and any other fringe benefits payable to National Officers which he would have received during the balance of the original term . . . ." (Emphasis added.)

Attached at the end of Perry's contract is an undated statement signed by Freedman, Segal and Karchmer, the Trustees of the Pension Plan, by which they acknowledged that paragraph 4 [2] of Perry's Agreement "shall be binding upon us and our successors in determining William Perry's entitlement to participation in, and benefits from, the NMU Officers Pension Plan." This statement may have been added on or about August 29, 1966, on which day Freedman, following discussions with Karchmer and Segal, furnished them with his legal opinion that:

> "There is no question but that this is a valid and binding agreement, and Perry's status as a covered employee continues at least until October 20, 1974, regardless of whether his services are discontinued by the union prior to that date. I recommend that the Trustees of the NMU Officers Pension Plan approve

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2. Paragraph 4 provides:

"4. For the purposes of determining Perry's entitlement to participation in and benefits from, the NMU Officers Pension Plan, the parties recognize, understand and agree that Perry shall be deemed to be a 'Participant' in 'Covered Employment' (as defined in the said Plan) during the full period of the original term of this Agreement, and the full four-year period of each renewal or extension thereof, notwithstanding anything to the contrary contained in paragraph 3 or any other provision of this Agreement."

and adopt the agreement to the extent that it relates to the NMU Officers Pension Plan."

In May of 1968, the plaintiffs wrote letters to Wall, Secretary-Treasurer of NMU, requesting that NMU institute suit or other proceeding to recover, on behalf of NMU, all monies contributed to the Pension Plan with rspect to non-officers, including the "Assistant to the President" (Perry). These letters were sent by certified mail on May 17 and May 23, 1968. Wall testified that he had received the letters. Curran testified that copies of the letter were handed to him but that he paid no attention to them as he considered them "propaganda". There is no evidence that these letters were brought to the attention of Segal and Karchmer or, but, according to Wall, they were brought to the attention of Freedman, who was both General Counsel of NMU and a Trustee of the Pension Plan.

On November 4, 1968, De Novellis, the Administrator of the Pension Plan, who worked in Segal's office, computed, at the request of Breit, the Controller of NMU, the lump sum equivalent of Perry's Regular Pension Benefit as of October 20, 1974, in the amount of $222,200.

On December 18, 1968, Curran sent a memorandum to Breit instructing him to prepare a check in the amount of $41,250.01 to be paid to the Pension Plan for Perry's account, and on the following day, December 19, NMU forwarded a check signed by Curran, in this amount, to the Pension Plan, which was in addition to NMU's regular contribution.[3] Upon receipt of the check for Perry's ac-

3. Article II, Section 2 of the amended Agreement and Declaration of Trust between NMU and the Trustees of the Pension Plan provides that NMU shall make quarterly payments to the Pension Plan equal to 26% of the compensation paid by NMU to the participants in the Pension Plan. There is no provision in the amended Agreement and Declaration of Trust authorizing special payments, such as the one made for Perry's account on December 19, 1968.

count, Karchmer, thinking it unusual, photostated the check. Karchmer testified that the check "wasn't accompanied with a regular routine report", but he believed that he received Curran's memorandum of December 18, 1968 or other substantiating data from Breit.

January 16, 1969.

Curran testified that at 9:30 a.m. he called Perry into his office and fired him, and that he immediately thereafter notified such officers as were available, adding that not many officers were available since they were conducting an election. (Apparently, pursuant to the order of Judge Motley, 284 F. Supp. 47 (1968).)[4] Curran then instructed Sovel, Freedman's partner, (Freedman being in Philadelphia that day), to examine Perry's contract and to see what Perry had coming to him. As Wall, the Secretary-Treasurer, was not available, Curran instructed Breit "to prepare everything that was coming to him" [Perry]. At some time during the same day Perry was handed a check signed by Curran, in the amount of $104,595.16, which check, according to Curran, covered Perry's wages, severance pay, vacation pay, and "all other monies due him" through October 20, 1974.

Freedman testified that at about 9:30 a.m. Sovel telephoned him in Philadelphia and told him that Perry had been fired. Apparently, by 10:00 a.m. Perry's application for pension benefits was prepared by Breit and delivered to Segal, because Freedman testified that at about 10:00 a.m. Segal telephoned him in Philadelphia asking for his

4. Curran testified that he had fired Perry a month before, but continued him when Karchmer interceded. In his deposition taken on November 11, 1970, Curran testified that on January 21, 1969 he told Perry he was preparing to recommend to the NMU National Office that Perry's position be abolished and that Perry's employment be terminated. Curran also testified in his deposition that he told no one about firing Perry until NMU's National Office meeting held on January 23, 1969.

legal opinion. Freedman testified that he immediately called Sovel. After satisfying himself that the $41,250.01 had been paid to the Pension Plan (which the record indicates was done on December 19, 1968), Freedman dictated his legal opinion[5] over the telephone to Sovel and authorized Sovel to sign his (Freedman's) name to it and deliver it to Segal. Apparently, Freedman's opinion was delivered to Segal forthwith because before the lunch hour Perry's application had been processed by Segal's office, delivered to the Trustees for their authorization,[6] and the authorization had been signed by Karchmer and Segal as Trustees, and by Sovel, who signed Freedman's name as Trustee.[7]

---

5. Freedman's legal opinion reads as follows:

"You have posed certain questions in connection with the retirement of Mr. William Perry as Assistant to President Joseph Curran of the National Maritime Union. The following are my answer to your inquiries:

1) Is Mr. Perry entitled to credit for covered employment for the period through October 20, 1974?

Yes, based on his contract with the Union, dated August 2, 1966, and pursuant to which contributions have been made by the Union to the Plan for the period through October 20, 1974.

2) In determining the amount of his pension benefits what attained age of William Perry is to be used?

His attained age as of October 20, 1974.

3) Is Mr. Perry entitled to receive immediate payment of the benefits which are payable to him in accordance with the answers to the above questions?

Yes.

I trust that the foregoing answers your inquiries."

6. The Pension Plan provides that it is within the sole discretion of the Trustees to make a lump sum payment of a Regular Pension Benefit (Article II, Section 1).

7. There is no provision in the Agreement and Declaration of Trust providing that a trustee may delegate his authority to a non-trustee. Freedman testified that he authorized Sovel to sign his name as Trustee after Sovel told him, "Mr. Perry is anxious to get it through (the payment of $222,200.) and everybody here [NMU] is anxious to get finished with the thing . . . ." (Tr. 305)

After lunch, Perry, accompannied by at least two gentlemen, one of whom was an officer of NMU, appeared in Karchmer's office and Perry presented the approved application to Karchmer and received from Karchmer a check payable to him in the amount of $222,200. postdated January 20, 1969.

So, despite being fired at 9:30, it wasn't a bad day for Mr. Perry.

On February 4, 1969, NMU not having started suit pursuant to plaintiffs' request of May, 1968, Judge Bryan signed an order authorizing the plaintiffs to sue under LMRDA.

MOTIONS TO DISMISS.

Each of the moving defendants contends that plaintiffs, as members of NMU, lack standing to seek to surcharge the defendants and that this court has no jurisdiction under Section 501 of LMRDA. Defendant Trustees Segal, Freedman and Karchmer contend that they have not breached their fiduciary duty as Trustees, and defendants Curran and Wall contend that they have not breached their fiduciary duty as union officers.

In 1958, the Senate Select Committee on Improper Activities in the Labor or Management Field issued an interim report stating that over ten million dollars in union funds were either stolen, embezzled, or misused by the officials of five labor unions over a period of fifteen years. One of the purposes of Congress in enacting LMRDA was to correct these abuses. Senate Report No. 187, 86th Cong., 1st Sess. (1959); H. R. Rep. No. 741, 86th Cong., 1st Sess. (1959). Section 401 of LMRDA, the Congressional declaration of findings, purposes and policy, provides in part as follows:

"(b) The Congress further finds, from recent investigations in the labor and management fields, that there have been a number of instances of breach of trust, corruption, disregard of the rights of individual employees, and other failures to observe high standards of responsibility and ethical conduct which require further and supplementary legislation that will afford necessary protection of the rights and interests of employees and the public generally as they relate to the activities of labor organizations, employers, labor relations consultants and their officers and representatives."

Section 501(a) provides that "the officers, agents, shop stewards, and other representatives of a labor organization occupy positions of trust in relation to such organization and its members as a group."[8]

---

8. ". . . It is, therefore, the duty of each such person, taking into account the special problems and functions of a labor organization, to hold its money and property solely for the benefit of the organization and its members and to manage, invest, and expend the same in accordance with its constitution and bylaws and any resolutions of the governing bodies adopted thereunder, to refrain from dealing with such organization as an adverse party or in behalf of an adverse party in any matter connected with his duties and from holding or acquiring any pecuniary or personal interest which conflicts with the interests of such organization, and to account to the organization for any profit received by him in whatever capacity in connection with transactions conducted by him or under his direction on behalf of the organization. A general exculpatory provision in the constitution and bylaws of such a labor organization or a general exculpatory resolution of a governing body purporting to relieve any such person of liability for breach of the duties declared by this section shall be void as against public policy."

Section 501(b) provides:

"When any officer, agent, shop steward, or representative of any labor organization is alleged to have violated the duties declared in subsection (a) of this section and the labor organization or its governing board or officers refuse or fail to sue or recover damages or assure an accounting or other appropriate relief within a reason-

In *Garton v. Arons,* 339 F. 2d 371, 375 (2d Cir. 1964), the Court of Appeals held that Section 501 is applicable only to those breaches of fiduciary duty involving union funds and property. Therefore, the threshold issue is whether for the purposes of Section 501 the funds which the Pension Plan paid to non-officers were funds of NMU.

There is authority that Section 501 does not reach employer appointed trustees of a "trust in which a labor organization is interested." (Section 402(1) of LMRDA.) *Tucker v. Shaw,* 308 F. Supp. 1, 8 (E. D. N. Y. 1970). But see, Dugan, *Fiduciary Obligations Under the New Act,* 48 Geo. L. J. 277, 293-94 (1959); Clark, *The Fiduciary Duties of Union Officials Under Section 501 of LMRDA,* 52 Minn. L. Rev. 437, 476 (1967). Here, however, the Pension Plan was established by NMU for the exclusive benefit of its officers, and the Trustees were appointed by NMU. The Court of Appeals determined that the Trustees were fiduciaries under Section 501 (423 F. 2d at 400), and they have been enjoined from making payments to non-officers out of the Pension Plan.

Pursuant to the judgment of this court in this action filed February 18, 1972, the Trustees of the Pension Plan have returned to NMU the full amount of its contributions made for the account of non-officers. Pursuant to the same

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8. (Cont'd.)
able time after being requested to do so by any member of the labor organization, such member may sue such officer, agent, shop steward, or representative in any district court of the United States or in any state court of competent jurisdiction to recover damages or secure an accounting or other appropriate relief for the benefit of the labor organization. No such proceeding shall be brought except upon leave of the court obtained upon verified application and for good cause shown, which application may be made ex parte. The trial judge may allot a reasonable part of the recovery in any action under this subsection to pay the fees of counsel prosecuting the suit at the instance of the member of the labor organization and to compensate such member for any expenses necessarily paid or incurred by him in connection with the litigation."

judgment, the Trustees of the Pension Plan were granted judgment against Perry, a non-officer, in the amount of $222,200. paid to him on January 16, 1969, and which the Trustees are now seeking to recover from Perry. This judgment was obtained by the plaintiffs, suing on behalf of NMU, and it is the law of the case that the action is under Section 501. There is no assurance that the Trustees of the Pension Plan will be able to recover the amounts which they improperly paid to Perry. Indeed, it may be that because of this payment to Perry the Trustees will be unable to make the payments to officers of NMU in accordance with the Agreement and Declaration of Trust unless further contributions to the Pension Plan are made by NMU. Therefore, plaintiffs, suing on behalf of NMU, have an interest under Section 501 to surcharge the Trustees of the Pension Plan in the event that the payment to Perry was in breach of their fiduciary duty as Trustees, it having been already determined that the payment to Perry was not in accordance with NMU's constitution. The payment to Perry came out of funds received from NMU and, accordingly, constituted NMU funds for the purposes of Section 501.

Defendant Trustees also contend that plaintiffs have no standing as a matter of trust law since they sue derivatively on behalf of NMU which, as settlor of the trust created under the Pension Plan, has no claim against the Trustees. III A. Scott, The Law of Trusts, § 200.1 (3d ed. 1967). *But see Burnet v. Wells,* 289 U. S. 670, 679 (1933); Note, *Right of a Settlor to Enforce a Private Trust,* 62 Harv. L. Rev. 1370, 1374-75 (1949). However, as the court in *Highway Truck Drivers and Helpers Local 10 v. Cohen,* 102 F. Supp. 608 (E. D. Pa.), *aff'd,* 284 F. 2d 162 (3d Cir. 1960), *cert. denied,* 365 U. S. 833 (1961), said:

> "Section 501, with which we are particularly concerned, is entitled 'Fiduciary responsibility of officers

of labor organizations.' This section, quoted earlier, attempts to define in the broadest terms possible the duty which the new federal law imposes upon a union official. Congress made no attempt to 'codify' the law in this area. It appears evident to us that they intended the federal courts to fashion a new federal labor law in this area, in much the same way that the federal courts have fashioned a new substantive law of collective bargaining contracts under §301(a) of the Taft-Hartley Act, 29 U. S. C. A. §185(a). See Textile Workers Union of America v. Lincoln Mills, 1957, 353 U. S. 448, 77 S. Ct. 923, 1 L. Ed. 2d 972. In undertaking this task the federal courts will necessarily rely heavily upon the common law of the various states. Where that law is lacking or where it in any way conflicts with the policy expressed in our national labor laws, the latter will of course be our guide."

182 F. Supp. at 617)

In carrying out the policy of LMRDA, the court concludes that, on the facts here stated, NMU has a claim against the Trustees if they violated their fiduciary duty. Moreover, as a matter of trust law, "it is the function of the court to see that the directions of the settlor [NMU] are carried out, even though no one complains to the court of the failure of the trustee to carry them out . . . ." Scott, *supra*, § 200.4 at 1640.

A reading of Perry's contract and of the Pension Plan fails to reveal any basis on which the Trustees of the Pension Plan could pay Perry a lump sum pension in 1969 based on his continuing in NMU's employ until October 20, 1974. Indeed, Perry's contract provided that in the event of his discharge he would be paid an amount equal to his total salary, "including contributions to the NMU Officers Pension Plan." This was the $41,250.01 which NMU paid

to the Pension Plan on December 19, 1968 at the direction of Curran.

Both Curran and Wall signed the Perry employment contract on behalf of NMU. On December 19, 1968, when NMU paid $41,250.01 to the Pension Plan for Perry's account, and on January 16, 1969 when the Pension Plan paid Perry $222,200., Wall and probably Curran were aware of plaintiffs' request that NMU institute suit to recover all monies contributed to the Pension Plan with respect to non-officers. This, coupled with the events of January 16, 1969, establishes at least a prima facie case that, as to the payment to Perry, the NMU officers, Curran and Wall, breached their fiduciary duty under Section 501(a).

The Trustees, Segal, Freedman and Karchmer, knew about the Perry employment contract. Freedman drew it, and as early as August, 1966, Segal and Karchmer had requested Freedman's legal opinion. Freedman's opinion letters of August 29, 1966 and January 16, 1969 do not show why the Trustees were authorized either to receive the payment of $41,250.01 for Perry's account or to pay Perry, as of January 16, 1969, a lump sum pension benefit computed to October 20, 1974. Indeed, there was nothing in the Agreement and Declaration of Trust or the Pension Plan providing for accelerated payments by NMU to the Pension Plan, and under the Pension Plan and Perry's contract it appears that October 20, 1974 was the earliest date on which Perry could have become eligible to receive a lump sum pension payment of $222,200.

The role of Mr. Freedman is particularly hard to understand. The evidence discloses that he was acting as a Trustee of the Pension Plan, giving legal advice to the other Trustees as to the Perry contract, which he had drawn, and at the same time was counsel for NMU. Moreover, in the early stages of this litigation he had acted as counsel for Perry.

On January 16, 1969 when defendant Freedman dictated his legal opinion over the telephone and had his name signed to it by Mr. Sovel, the evidence is clear that Mr. Freedman was on notice that the plaintiffs had requested NMU to institute an action to stop payments under the Pension Plan to non-officers, and he knew that Perry was a non-officer. While there is no evidence that defendants Segal and Karchmer knew this, the undue haste in which they were called upon to act on January 16 should at least have put them on inquiry. Indeed, Segal telephoned Freedman in Philadelphia and it must have seemed strange to have the opinion returned to him in New York bearing Freedman's signature an hour or so later. As to Karchmer it is hard to understand his haste in giving a post-dated check to Perry.

Segal and Karchmer contend that they were entitled to rely on the opinion of counsel. This proposition is true as a general rule, but here they were relying on the opinion of their fellow Trustee, Freedman, whom they knew to be general counsel for NMU, and Segal, at least, knew that the opinion of counsel was not the result of any deliberation on Freedman's part.

It is true that the Agreement and Declaration of Trust limits the liability of the Trustees to wilful misconduct. However, plaintiffs have made out a prima facie case of wilful misconduct on the part of the Trustees as to the payment to Perry.

As to the payments by the Pension Plan to the other non-officers, plaintiffs have failed to prove by a preponderance of the evidence that Curran, Wall, Segal, Freedman or Karchmer were guilty of a breach of fiduciary duty for which they can be held personally liable.

The motions of the defendants Curran, Wall, Segal, Freedman and Karchmer at the end of plaintiffs case, are

granted with respect to the payments made to non-officer employees other than Perry. The motions are denied with respect to the payment made to defendant Perry by the Pension Plan on January 16, 1969. The hearing will be continued on July 7, 1972, at 10:00 A. M. in Room 618, United States Court House, at which time these defendants may present their evidence.

It is so ordered.

DUDLEY B. BONSAL,
U. S. D. J.

Dated: New York, N. Y.
June 27, 1972.

DISTRICT COURT OPINION, OCTOBER 26, 1972.

BONSAL, D. J.

In prior proceedings it has been held that the 1960 constitution of the National Maritime Union of America ("NMU") did not authorize the inclusion of non-officers of NMU in the NMU Officers Pension Plan ("the Officers Pension Plan"), and that NMU was entitled to recover from the Trustees of the Officers Pension Plan all amounts paid by NMU into the Officers Pension Plan for the account of non-officers, plus interest. *Morrissey v. Curran*, 302 F. Supp. 32 (S. D. N. Y. 1969), *aff'd in part, rev'd in part*, 423 F. 2d 393 (2d Cir.), *cert. denied*, 399 U. S. 928 (1970), 400 U. S. 826 (1970), *on remand*, 336 F. Supp. 1107 (S. D. N. Y. 1972). Accordingly, on February 18, 1972, judgment was entered in favor of NMU against the Officers Pension Plan in the amount of $674,222.60 (representing $520,283.38 paid by NMU to the Officers Pension Plan for the account of non-officers, plus interest in the amount of $153,939.22), which judgment has been paid. On February 18, 1972, judgment was also entered in favor of the Officers Pension Plan against the defendant William Perry ("Perry"), a non-officer, in the principal amount of $222,200. (the amount of the lump sum pension paid to him), plus interest in the amount of $41,107., or a total of $263,307. This judgment has not been paid. The court has been advised that the Officers Pension Plan has instituted supplementary proceedings to collect the Perry judgment.

By Memorandum filed January 11, 1972, plaintiffs were authorized to "notice a hearing to determine the personal liability, if any, of the defendant trustees [of the Pension Plan]. Freedman, Segal and Karchmer, and officers [of NMU]. Curran and Wall, to NMU for the monies which

the Pension Plan has paid out to non-officers and which it is unable to recoup." The hearing was held, and plaintiffs presented their evidence on April 13, 14 and May 1, 1972. The defendants then moved to dismiss, pursuant to Rule 41(b), F. R. Civ. P., on the ground that plaintiffs had shown no right to relief. By Memorandum filed June 29, 1972, the defendants' motions were granted with respect to the payments made to non-officer employees of NMU other than Perry,[1] and were denied with respect to the payment made to defendant Perry by the Officers Pension Plan on January 16, 1969. On July 12, 1972, the hearing was resumed and the defendants presented their evidence.

Plaintiffs are members of NMU, suing on behalf of all of its members under Section 501[2] of the Labor-Management Reporting and Disclosure Act of 1959 ("LMRDA"), 29 U. S. C. § 501. Defendants Martin Segal ("Segal"), Abraham E. Freedman ("Freedman") and Leon Karch-

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1. These payments were made as follows:

Sara Laderhandler	$ 9,201
James Tevan	$ 12,799
Sophia Tevan	$ 11,561
Irving Brauch	$115,510

2. Section 501(a) provides, to the extent here relevant:

"(a) The officers, agents, shop stewards, and other representatives of a labor organization occupy positions of trust in relation to such organization and its members as a group. It is, therefore, the duty of each such person, taking into account the special problems and functions of a labor organization, to hold its money and property solely for the benefit of the organization and its members and to manage, invest, and expend the same in accordance with its constitution and bylaws and any resolutions of the governing bodies adopted thereunder, to refrain from dealing with such organization as an adverse party or in behalf of an adverse party in any matter connected with his duties and from holding or acquiring any pecuniary or personal interest which conflicts with the interests of such organization, and to account to the organization for any profit received by him in whatever capacity in connection with transactions conducted by him or under his direction on behalf of the organization."

mer ("Karchmer") are the trustees of the Officers Pension Plan pursuant to an Agreement and Declaration of Trust of December 29, 1952 as subsequently amended. Freedman is also General Counsel of NMU. Defendant Joseph Curran ("Curran") is the President of NMU. Defendant Shannon Wall ("Wall") is the Secretary-Treasurer of NMU.

Freedman became a trustee of the Officers Pension Plan in 1963 when he became General Counsel of NMU. As trustee, Freedman drafts legal documents for the Officers Pension Plan and renders legal opinions to the other trustees.

Segal has been a trustee since the inception of the Officers Pension Plan in 1953, and the Martin E. Segal Company ("the Segal Company"), of which Segal is Chairman of the Board, has administered it. The Segal Company processes pension applications and computes pension benefits. The Segal Company also is the actuary for the NMU Welfare Plan and a pension plan covering the membership of NMU.

Karchmer, an original trustee of the Officers Pension Plan, is a Certified Public Accountant whose firm acts for NMU, the NMU Welfare Plan, the NMU Vacation Plan and the pension plan covering the membership of NMU. Karchmer keeps the books of the Officers Pension Plan and issues and receives checks on its behalf.

Statement of Facts With Respect to Perry.

Perry had been employed by NMU since 1954, and as Assistant to the President since 1958. On August 2, 1966, he entered into an employment contract with NMU which provided that he would continue in the employ of NMU to serve as Assistant to the President until October 20, 1974. Paragraph 3 of the contract provided:

> "In the event that this Agreement or Perry's employment should be terminated, with or without cause, prior to the expiration date hereof . . . Perry shall be entitled to continue to receive his said salary in full, including contributions to the NMU Officers Pension Plan and any other fringe benefits payable to the National Officers as under paragraph 2 hereof, during the balance of the terms hereof. . . . In the event, however, of such termination . . . Perry shall have the option to demand and receive at one time . . . an amount equal to the said total salary, *including contributions to the NMU Officers Pension Plan* and any other fringe benefits payable to National Officers which he would have received during the balance of the original term. . . ." (Emphasis added.)

Attached at the end of Perry's contract is an undated statement signed by Freedman, Segal and Karchmer, the Trustees of the Officers Pension Plan, by which they acknowledged that paragraph 4[3] of Perry's Agreement "shall be binding upon us and our successors in determining William Perry's entitlement to participation in, and benefits from, the NMU Officers Pension Plan." There is appended at the end of this opinion a copy of the Perry contract and of the statement signed by the trustees. The statement signed by the trustees may have been added on or about August 29, 1966, on which day Freedman, follow-

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3. Paragraph 4 provides:

"4. For the purposes of determining Perry's entitlement to participation in and benefits from, the NMU Officers Pension Plan, the parties recognize, understand and agree that Perry shall be deemed to be a 'Participant' in 'Covered Employment' (as defined in the said Plan) during the full period of the original term of this Agreement, and the full four-year period of each renewal or extension thereof, notwithstanding anything to the contrary contained in paragraph 3 or any other provision of this Agreement."

ing discussions with Karchmer and Segal, furnished them with his legal opinion, quoted in part as follows:

"It is my considered judgment that Perry would continue as a 'Participant' in 'Covered Employment', even though his services may be discontinued by the union. The contract specifically so provides and must be so construed without any question.

* * *

"It is made crystal clear in the agreement that both the union and Perry agreed that Perry shall be deemed to be an employee of the NMU during the full term of the agreement, including any renewals or extensions. As above indicated, the agreement first of all provides that Perry shall continue in the 'employ' of NMU as Assistant to the President until October 20, 1974.

"Paragraph 1 of the agreement specifically requires the union to pay his salary, contributions to the NMU Officers Pension Plan and fringe benefits during the entire term of the agreement. Paragraph 2 of the agreement pointedly covers the inquiry made by Marty and provides that the payment of salary, contributions to the NMU Officers Pension Plan must be paid to the end of the term, notwithstanding any termination of his services with or without cause prior to the expiration date. Paragraph 3 expressly provides that Perry is to be deemed to be a 'Participant' in 'Covered Employment' (as defined in the Plan) during the full term of the original agreement and any extension. Paragraph 4 of the agreement specifically shows that the parties recognize, understand and agree that Perry shall be deemed to be a 'Participant' in 'Covered Em-

ployment' as defined in the NMU Officers Pension Plan to the very end of the term of the agreement or any extension notwithstanding anything that might be construed to be to the contrary elsewhere in the agreement, such as a termination of services with or without cause.

"In summary, in consideration of Perry's services to the union, past and future, the union agreed to maintain Perry in its employ at least until October 20, 1974 with full pay and all other benefits until the very end of that term or any renewal thereafter. There is no question but that this is a valid and binding agreement, and Perry's status as a covered employee continues at least until October 20, 1974, regardless of whether his services are discontinued by the union prior to that date. I recommend that the Trustees of the NMU Officers Pension Plan approve and adopt the agreement to the extent that it relates to the NMU Officers Pension Plan."

In May of 1968, the plaintiffs wrote several letters to Wall, Secretary-Treasurer of NMU, demanding that NMU institute suit or other proceeding to recover, on behalf of NMU, all monies contributed to the Officers Pension Plan with respect to non-officers, including the "Assistant to the President" (Perry). These letters were sent by certified mail on May 17 and May 23, 1968. Wall received the letters, made copies of them available to Curran and Charles Sovel, Freedman's law partner, and after checking the NMU constitution and conferring with Sovel, Wall decided not to institute suit on behalf of NMU. There is no evidence that plaintiffs were notified. Curran testified that copies of plaintiffs' letters were handed to him but that he paid no attention to them as he considered them "propa-

ganda." There is no evidence that plaintiffs' letters were brought to the attention of Segal and Karchmer.

In a letter dated November 4, 1968, Mr. De Novellis, an administrator of the Officers Pension Plan at the Segal Company, informed Perry, at the request of Milton Breit, the controller of NMU, that as of October 20, 1974 the lump sum equivalent of his Regular Pension Benefit would be $222,200.

On December 18, 1968, Curran sent a memorandum to Breit instructing him to prepare a check in the amount of $41,250.01 to be paid to the Officers Pension Plan for Perry's account. The memorandum read in part, as follows:

> "This check represents the monies due in accordance with the employment contract agreement with the National Maritime Union of America and William Perry. The computation of the amount of $41,250.01 is based upon Mr. William Perry's current regular and vacation pay and is for the period December 1, 1968 thru and including October 20, 1974 multiplied by the current percentage rate of contribution which is 26%."

On the following day, December 19, NMU forwarded a check, signed by Curran, to the Officers Pension Plan in this amount for the account of Perry, which was in addition to NMU's regular contribution due at that time.[4]

4. Article II, Section 2 of the amended Agreement and Declaration of Trust between NMU and the Trustees of the Pension Plan provides that NMU shall make quarterly payments to the Pension Plan equal to 26% of the compensation paid by NMU to the participants in the Pension Plan. There is no provision in the amended Agreement and Declaration of Trust authorizing special payments, and the Officers Pension Plan did not maintain separate accounts for each participant.

Karchmer photostated the check before depositing it as he had not previously received a payment of this kind. Karchmer testified that the check "wasn't accompanied with a regular routine report," but he believed that he received Curran's memorandum or other substantiating data from Breit.

January 16, 1969

Curran testified that at 9:30 a.m. he called Perry into his office and fired him, and that he immediately notified such officers as were available. He said that not many officers were available since they were conducting a Union election.

Curran testified that after firing Perry, he instructed Freedman's partner Sovel (Freedman being in Philadelphia that day), to examine Perry's contract and to see what Perry had coming to him. As Wall, the Secretary-Treasurer, was not available, Curran instructed Controller Breit "to prepare everything that was coming to him" [Perry]. At some time during the same day, Perry was handed a check signed by Curran, in the amount of $104,595.16, which, according to Curran, covered Perry's wages, severance pay, vacation pay, and "all other monies due him" through October 20, 1974. Curran testified that he had first fired Perry a month before when he directed that the $41,250.01 be paid the Officers Pension Plan for Perry's account, but that he had changed his mind when Karchmer interceded on Perry's behalf.

Freedman testified that at about 9:30 a.m. on January 16, 1969, Sovel telephoned him in Philadelphia and told him that Perry had been fired. Apparently, by 10:00 a.m. Perry's application for pension benefits was prepared by Breit and delivered to Segal, because Freedman testified that at about 10:00 a.m. Segal telephoned him in Philadelphia asking for his legal opinion. Freedman testified that he immediately called Sovel. After satisfying himself that

the $41,250.01 had been paid to the Pension Plan (which the record indicates was done on December 19, 1968), Freedman dictated his legal opinion [5] over the telephone to Sovel

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5. Freedman's legal opinion reads as follows:

(Letterhead of)

ABRAHAM E. FREEDMAN

COUNSELLOR AT LAW AND PROCTOR IN ADMIRALTY

36 Seventh Ave., New York, N. Y. 10011

Oregon 5-4211

Charles Sovel
Stanley D. Gruber
Ned R. Phillips
Edward M. Katz
Martin L. Katz

Philadelphia, Pa. Office
Freedman, Borowsky and Lorry
Chestnut Street at Fifth
Walnut 5-8400

January 16, 1969

Mr. Martin E. Segal
Martin E. Segal Company
730 Fifth Avenue
New York, New York 10019

Re: *William Perry*

Dear Mr. Segal:

You have posed certain questions in connection with the retirement of Mr. William Perry as Assistant to President Joseph Curran of the National Maritime Union. The following are my answers to your inquiries:

1) Is Mr. Perry entitled to credit for covered employment for the period through October 20, 1947?

Yes, based on his contract with the Union, dated August 2, 1966, and pursuant to which contributions have been made by the Union to the Plan for the period through October 20, 1974.

2) In determining the amount of his pension benefits what attained age of William Perry is to be used?

His attained age as of October 20, 1974.

3) Is Mr. Perry entitled to receive immediate payment of the benefits which are payable to him in accordance with the answers to the above questions?

Yes.

I trust that the foregoing answers your inquiries.

With best personal regards, I am,

Sincerely,

/s/ ABRAHAM E. FREEDMAN
Abraham E. Freedman

AEF/ff

and authorized Sovel to sign his (Freedman's) name to it and deliver it to Segal.

Segal testified that after he learned Perry was leaving NMU he telephoned Freedman and asked him whether the period of service to be credited in computing Perry's lump sum pension benefit was to be through 1974. Freedman said it was, and promised to send Segal an opinion letter. In his deposition, Segal testified that this conversation occurred prior to January 16, but at trial he testified that the conversation occurred on the morning of January 16, 1969. Segal also testified that he did not know at the time of the conversation that Freedman was in Philadelphia.

Apparently, before the lunch hour on January 16, 1969, the Freedman opinion letter was delivered to the Segal Company, Perry's pension application was processed and written approval had been given by Segal and Freedman (Sovel signed Freedman's name as trustee). Freedman explained that he authorized Sovel to sign his name after Sovel told him, "Mr. Perry is anxious to get it through [the payment of $222,200] and everybody here [NMU] is anxious to get finished with the thing . . ." (Transcript p. 305).

Karchmer testified that Perry, accompanied by Sovel and two other gentlemen associated with NMU, appeared in his office after lunch and presented him with the pension application. Karchmer testified that before approving the application he carefully studied Freedman's opinion letter because the payment to Perry was the first of its kind. Since there were insufficient funds on hand in the Officers Pension Plan's checking account to cover Perry's lump sum benefit of $222,200, and Perry demanded immediate payment, Karchmer approved the application and issued Perry a check postdated to January 20, 1969.

Karchmer testified that it was unprecedented for an application to be prepared by NMU, processed by the Segal

Company and approved by the trustees, with payment being made on it, in little more than half a day. Karchmer also testified that the payment to Perry was the first of its kind and was the largest payment ever made by the Officers Pension Plan.

On February 4, 1969, since NMU had not commenced suit as requested by plaintiffs in May of 1968, Judge Bryan signed an order authorizing the plaintiffs to sue under LMRDA.

In its memorandum of June 29, 1972, the court found plaintiffs had standing to sue defendants under Section 501 of LMRDA (29 U. S. C. § 501). Therefore, the issue remaining is whether in making the payment of $222,200 to Perry on January 16, 1969, Freedman, Segal and Karchmer breached their fiduciary duty as trustees and Curran and Wall breached their fiduciary duty as NMU officers.

As to the Trustees (Freedman, Segal and Karchmer)

Article III, Section C of the Agreement and Declaration of Trust as revised to October 28, 1961 deals with the powers and duties of the trustees. Paragraph 1 provides:

> ". . . The Trustees shall have full and sole discretion to determine the amount of such benefits and the terms and conditions of payment and shall have the power to conclusively determine all questions concerning the payment of benefits to any individual recipient or proposed recipient."

Paragraph 4 provides that the trustees shall not be liable "for any loss to, or diminution of the Fund, except due to their own wilful misconduct." Paragraph 5 provides:

> "The Trustees . . . shall be protected in relying and acting upon the opinion of legal counsel (including opinion of legal counsel who is . . . a trustee hereunder) in connection with any matter pertaining to the administration or execution of this Trust Fund.

> No trustee shall be liable for any action taken . . . by him unless such act . . . is the result of wilful misconduct, nor for the acts of any . . . attorney selected by the Trustees with reasonable care, nor for any act . . . of any other Trustee."

These provisions must be strictly construed, and they do not relieve a trustee of liability for a breach of trust constituting a willful violation of his duty, or committed in bad faith or with reckless indifference to the interests of the trust, or for any profit a trustee may have derived from the breach of trust. Restatement (Second) of Trusts, § 222 (1959); *Browning v. Fidelity Trust Co.*, 250 F. 321, 325 (3d Cir. 1918) *cert. denied*, 248 U. S. 564 (1918); *Newhouse v. Canal National Bank of Portland*, 124 F. Supp. 239 (D. Maine, 1954).

While these provisions protect the trustees against liability resulting from negligence, *Thompson v. Hays*, 11 F. 2d 244, 248 (8th Cir. 1926), the trustee may be held liable if they have "intentionally disregarded the rules which control the actions of prudent men in conducting their own business affairs." *Crabb v. Young*, 92 N. Y. 56, 57 (1883); *In re Howard*, 110 App. Div. 61, 97 N. Y. S. 23, 24 (2d Dept. 1905), *aff'd* 185 N. Y. 539 (1906).

Under the Pension Plan, the trustees were given sole discretion to make lump sum payments to a participant (NMU Officers Pension Plan, Article V, Section 8). However, neither the Plan nor the Agreement and Declaration of Trust authorized the trustees to make a lump sum payment to Perry in 1969 computed on the pension he would have been entitled to receive at the expiration of his contract on October 20, 1974. Nor does Perry's contract entitle him to such a lump sum payment. Paragraph 3 of Perry's contract hereinbefore set forth gave Perry two options upon the termination of his contract prior to Octo-

ber 20, 1974—he could either continue to receive his salary in full, including contributions to the NMU Officers Pension Plan during the balance of the term, or he could demand and receive at one time an amount equal to the total salary he would have earned to the termination, "including contributions to the NMU Officers Pension Plan." On January 16, 1969, NMU paid Perry an amount equal to the total salary he would have earned to the termination (October 20, 1974). Previously, on December 18, 1968, NMU prepaid the Officers Pension Plan the contributions it would have been required to pay to the termination ($41,250.01).

The only obligation the trustees undertook when they signed the rider to Perry's contract was to include Perry as a participant of the Officers Pension Plan during the full period of the original term of the contract even if his employment was terminated prior to that time. With respect to accepting contributions to the Officers Pension Plan for Perry and paying Perry pension benefits, the trustees were bound by the terms of the Agreement and Declaration of Trust and the Pension Plan.

Freedman's legal opinion of January 16, 1969 stated that Perry was entitled to credit for covered employment for the period through October 20, 1974 based on his contract with NMU, pursuant to which "contributions have been made by the Union to the Plan for the period through October 20, 1974," and that Perry was "entitled to receive immediate payment." This was wrong, on both counts.

Under the Agreement and Declaration of Trust, the prepayment of contributions to the Officers Pension Plan on behalf of Perry was not authorized. Article II, Section 2 of the Amended Agreement and Declaration of Trust is the sole provision covering contributions to the Officers

Pension Plan. It provides that NMU shall make quarterly payments to the Officers Pension Plan equal to 20% of the compensation paid by NMU to the participants in the Officers Pension Plan for that quarter. Moreover, as Karchmer testified, "Payments which were made to the trustees were made without specific application to any beneficiary of the Plan. There were no separate accounts for beneficiaries."

Nor was there any legal basis, despite Freedman's opinion, for the payment to Perry of a lump sum pension of $222,220 on January 16, 1969. This pension was payable on October 20, 1974, and then only if the trustees at that time exercised their discretion under Article V, Section 8 of the Pension Plan to pay Perry a lump sum. Before October 20, 1974, this court and the Court of Appeals held that the inclusion of Perry in the Officers Pension Plan violated NMU's constitution.

Freedman acted simultaneously as a trustee, counsel to the trustees, and counsel to NMU. He had drawn the Perry contract, and represented Perry in the earliest stages of this litigation. The evidence shows that he dictated his legal opinion from the top of his head while in Philadelphia and had his name signed to it by Sovel. He showed a reckless indifference to his duty as a trustee as well as the interests of his fellow trustees, who relied on his opinion. Indeed, he was indifferent to his duty to NMU as well, as he knew that Perry's participation in the Officers Pension Plan had been challenged by the plaintiffs (which challenge was later sustained by this court and the Court of Appeals). Moreover, he knew, or should have known, that NMU made quarterly payments to the Officers Pension Plan equal to 26% of the compensation paid *for that quarter,* and, as pointed out by Karchmer, the payments were made without specific application to any beneficiary, as there were no separate accounts for beneficiaries.

The court concludes with regret that Freedman acted with reckless indifference to his duty as trustee. Therefore, as trustee, he will be subject to surcharge for the lump sum pension paid to Perry.

Segal, an acknowledged expert in the pension field, testified that the payment of Perry's lump sum pension several years before the termination of his contract was unique in his experience. He was also aware of the pressure to which the trustees were being subjected to make the payment on the same day that Perry was presumably fired, and that very little time elapsed between his request for Freedman's legal opinion and its delivery.

Karchmer was put on inquiry the previous December when he received NMU's check for $41,250.01 for Perry's account, which he thought unusual enough to photostat. He testified that Perry's lump sum payment was the first of its kind and largest ever made by the Officers Pension Plan, and processed faster than any other. Despite this, he delivered a post-dated check to Perry on the day of Perry's application.

The evidence does not show that Segal and Karchmer knew that the inclusion of Perry and other non-officers in the Officers Pension Plan had been challenged by the plaintiffs. Moreover, the Agreement and Declaration of Trust specifically protected them in "relying and acting upon the opinion of legal counsel (including opinion of legal counsel who is . . . a trustee . . .) in connection with any matters pertaining to the administration or execution of this Trust Fund." Both Segal and Karchmer relied on, and acted upon, Freedman's opinion in making the payment to Perry. While on the facts presented they were negligent in doing so, there is no evidence that they willfully violated their duty as trustees or were guilty of bad faith. The Agreement and Declaration of Trust specifically protects them

from liability from the acts of any other trustees. Accordingly, they cannot be surcharged for the payment to Perry, and judgment may be entered dismissing the action as against them.

NMU Officers (Curran and Wall)

Curran, President of NMU, had a fiduciary responsibility under Section 501(a) of LMRDA (29 U. S. C. §501(a)) with respect to the funds of NMU. For the purposes of Section 501(a), the funds paid by NMU to the Officers Pension Plan and by it to Perry were funds of NMU. Curran negotiated the Perry employment contract and signed it on behalf of NMU, and had also signed the Agreement and Declaration of Trust. Although he dismissed plaintiffs' request as propaganda, Curran knew that the plaintiffs had requested NMU to institute this action to recover monies paid to the Officers Pension Fund for the account of non-officers on the ground that such payments violated the NMU constitution, and that it was charged that Perry was a non-officer. Curran was in a position of trust to expend NMU funds only in accordance with the NMU constitution. Curran also knew or should have known that the Agreement and Declaration of Trust did not authorize the prepayment of contributions to the Officers Pension Plan. Nevertheless, on December 18, 1968, when he fired Perry for the first time, he instructed Breit to prepare a check from NMU funds in the amount of $41,250.01 to be paid to the Officers Pension Plan for Perry's account, and on the following day he signed the check, which was then forwarded to the Officers Pension Plan. However, the $41,250.01 has been recoverd by NMU, so that even if he violated his fiduciary duty, there is no occasion for surcharging him in this amount.

Curran testified that on January 16, 1969 he fired Perry (for the second time), and that immediately thereafter he

instructed Controller Breit to prepare everything that was coming to Perry. He signed the check to Perry in the amount of $104,595.16 covering Perry's wages, severance pay, vacation pay, and "all other monies due him" through October 20, 1974. This would appear to have been in accordance with Paragraph 3 of Perry's contract, which provided that in the event of termination, Perry could demand and receive at one time an amount equal to his total salary and other fringe benefits which he would have received during the balance of the original term. The evidence indicates that Curran dominated the people who had anything to do with the payment from the Officers Pension Plan to Perry. Karchmer testified, "Well, to go in to Joe [Curran] is a very fearful process." (451). Freedman testified that he was told by Sovel, "Mr. Perry is anxious to get it through and everybody here is anxious to get finished with the thing." (305). When Perry appeared in Karchmer's office to obtain the check for $222,200, he was accompanied by Freedman's partner Sovel, Strassman, an officer of NMU, and Shapiro, Executive Director of the NMU Pension Welfare Fund. (459). Undoubtedly, Curran used the power of his office to get Perry everything that was coming to him on January 16th. However, there is no evidence that on January 16th Curran directed the payment to Perry of $222,200 or directed Freedman to furnish the legal opinion to the trustees. Consequently, on the evidence presented, plaintiffs have failed to prove that Curran breached his fiduciary duty under LMRDA. See *Richardson v. Tyler*, 309 F. Supp. 1020 (N. D. Ill. 1970).

Wall, Secretary-Treasurer of NMU, knew that plaintiffs had requested NMU to institute action to recover monies attributed to the Officers Pension Plan with respect to non-officers. Indeed, he testified that he brought this to the attention of Curran and the NMU lawyers. However,

the evidence establishes that he played no part either in the payment of the $41,250.01 paid to the Officers Pension Plan on December 18, 1968 or in the events of January 16, 1969. Accordingly, there is no basis for finding that Wall breached his fiduciary duty under LMRDA.

For the foregoing reasons, defendant Freedman is surcharged with respect to the $222,200 paid by the Officers Pension Plan to Perry and which has not been repaid. The application to surcharge the defendants Segal, Karchmer, Curran and Wall is denied, and the action is dismissed with respect to them.

The foregoing constitutes the court's findings of fact and conclusions of law. F. R. Civ. P. 52(a).

Settle judgment on notice.

DUDLEY B. BONSAL,
U. S. D. J.

Dated: New York, N. Y.
October 26, 1972.

COURT OF APPEALS OPINION.

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

No. 689, 1089, 1090, 1091—September Term, 1972.
(Argued April 11, 1973 Decided June 18, 1973.)
Docket Nos. 72-2443
73-1082
73-1363
73-1383

JAMES M. MORRISSEY, JOSEPH PADILLA, RALPH IBRAHIM, individually and on behalf of the members of the National Maritime Union of America,
Plaintiffs-Appellants-Appellees,

v.

JOSEPH CURRAN, SHANNON WALL, WILLIAM PERRY, ABRAHAM E. FREEDMAN,
Defendants-Appellees-Appellants,

MARTIN SEGAL and LEON KARCHMER,
Defendants-Appellees.

Before: SMITH, HAYS, and TIMBERS, *Circuit Judges.*

Appeal from a judgment of the United States District Court for the Southern District of New York, Dudley B. Bonsal, *Judge,* holding that (1) the decision of this court on a prior appeal did not require that all payments made to the Officers' Pension Fund on account of non-elected personnel be refunded to the Union; (2) the trustees Segal and Karchmer should not be surcharged for the payments

to Perry and Brauch; (3) the trustee Freedman should be surcharged for the payment to Perry but not Brauch; (4) the defendant officers Curran and Wall are not personally liable for the payments to Perry or for the amount set aside to establish a trust fund for current employees; and (5) award of counsel fees to plaintiffs in the sum of $111,864 shall be assessed against the Union.

Affirmed.

ARTHUR E. MCINERNEY (Duer & Taylor, New York, New York, on the brief), *for Plaintiffs-Appellants-Appellees.*

JOSEPH P. ALTIER (Ira Gammerman, Bromsen, Gammerman, Altier & Wayne, New York, New York, on the brief), *for Defendants-Appellees-Appellants Joseph Curran and Shannon Wall.*

SIMON H. RIFKIND (Neil H. Cogan, Paul, Weiss, Rifkind, Wharton & Garrison, New York, New York, on the brief), *for Defandant-Appellee-Appellant Abraham E. Freedman.*

ARTHUR S. OLICK (Kriendler, Relkin, Olick & Goldberg, New York, New York, on the brief), *for Defendant-Appellee-Appellant, William Perry.*

ROY L. REARDON (Melvyn L. Cantor, Ronald L. Ginns, Simpson, Thacher & Bartlett, New York, New York, on the brief), *for Defendant-Appellee Martin Segal.*

HERMAN E. COOPER (Surrey, Karasik, Morse & Seham, New York, New York, on the brief), *for Defendant-Appellee Leon Karchmer.*

HAYS, *Circuit Judge:*

This action was brought under the provisions of Section 501 of the Labor Management Reporting and Disclosure Act, 29 U .S. C. § 501 by plaintiffs as members of the National Maritime Union of America. Defendants Curran and Wall were the President and Secretary-Treasurer of the NMU. Defendants Karchmer, Segal and Freedman were trustees of the NMU Officers' Pension Plan. Defendant Perry is the former Assistant to the President of the NMU.

In the original complaint plaintiffs asked for several forms of relief:

(a) an accounting of monies expended by the NMU and the trustees of the NMU Officers' Pension Plan for pension benefits on behalf of non-elected officers and employees of the Union; (b) damages from certain of the defendants; (c) an injunction against the trustees to restrain them from paying any pension benefits to non-elected officers and employees of the Union; and (d) an award of counsel fees.

The origin of the dispute is to be found in a trust agreement executed in 1952 by the National Council of the NMU pursuant to its authority to provide pensions for its officers and employees. Originally, the trust agreement provided for pensions only for officers, and in 1953, the trustees under the agreement adopted a pension plan for the officers of the NMU. The funds of the trust came from an initial contribution from the union supplemented by quarterly installments.

In 1961 the trust was amended to include in the pension plan certain employees of the Union.[1] The Union contrib-

1. The 1961 amendment broadened the coverage of the pension fund to include the following categories of persons:

1) "Union Representatives," defined as persons employed in the

uted additional funds to cover the cost of the expanded pension plan.

In 1964 the pension plan was again altered to include some full time employees of the Union not previously covered.[2]

In this action, originally brought in 1969, plaintiffs charged that the 1961 and 1964 amendments to the trust agreement including non-elected employees in the pension plan were void because they were adopted on behalf of the NMU by the National Office rather than the National Council. The district court granted plaintiffs' cross-motion for summary judgment, holding that the inclusion of certain non-officer employees of the NMU Officers' Pension Plan was improper. The district court ordered the defendants to account, enjoined the trustees from paying pension benefits to non-officers, and directed the trustees to return to the Union all moneys received by them for the benefit of non-officers.

This court affirmed [3] the decision of the district court, *Morrissey v. Curran*, 423 F. 2d 393 (2nd Cir.), *cert. denied*,

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1. (Cont'd.)
positions of Assistant to the President and Organizer; and 2) "Supervisory or Professional" employees of the Union occupying the positions of Maintenance Supervisor, Bookkeeping Supervisor, Records and Supply Supervisor, Executive Secretary, Publicity Director and Editor of the "Pilot."

2. Under the 1964 Amendment, the coverage was broadened to include:

> "All other employees of the union except (a) any employee whose compensation, hours of work or conditions of employment are determined by or with reference to a collective bargaining agreement, (b) any employee whose customary employment by the union is for not more than twenty (20) hours in any one week or for not more than five (5) months in any one calendar year, and (c) aliens employed in a foreign country."

3. The district court had held effective an attempt by the union to validate retroactively the pension amendments. This court reversed that aspect of the district court's determination.

400 U. S. 826 (1970) and remanded the case to insure that the accounting and the return of funds to the union treasury proceed as ordered. The Supreme Court denied certiorari.

On remand, the district court entered judgment against the trust fund and in favor of the union in the sum of $520,283.39, the amount of contributions made to the plan on behalf of the employees who were held to be ineligible. Although the district court found that the trustees had made unlawful pension payments to employees in the amount of $371,271 it held that except with respect to the payments made to Perry, none of the defendants could be surcharged. As to Perry it held that Freedman, one of the trustees of the pension plan, was personally liable for the payments.

Plaintiffs contend that the judgment of the district court is inadequate because it does not include moneys paid on account of the NMU officers who were appointed rather than elected. Plaintiffs also claim that the trustees should have been surcharged for payments made by them to Irving Brauch, a non-officer employee, that defendants Curran and Wall should have been surcharged for the payments to Perry, that defendants Karchmer and Segal should have been surcharged for the payments to Perry, and that the award of fees to their attorneys and accountants was inadequate. Defendants Curran and Wall appeal on the grounds that the award to plaintiffs' attorneys and accountants was excessive. Defendant Freedman appeals on the grounds that he should not have been surcharged with respect to payments to Perry.

I.

The first issue raised by plaintiffs is whether the district court correctly ruled that agents, field patrolmen and

patrolmen, who were appointed, not elected officers of the NMU, were entitled to pensions under the Officers' Pension Plan. As the district court found, eligibility for payments under the pension plan depended not on whether the persons in question were elected or non-elected but on whether they were officers or only employees. Under the NMU constitution patrolmen, field patrolmen and agents were clearly designated as officers, though by virtue of amendments to the constitution some of these officers were at some times appointed rather than elected.

The plaintiffs contend that on the prior appeal this court interpreted the NMU constitution to deny coverage to non-elected officers. That issue was not before us on the previous appeal and we did not decide it one way or the other. There is nothing in our prior opinion which prevents our accepting the ruling of the district court which seems to us to be correct.

II.

The district court held that none of the three trustees was liable for the payments to Brauch, and that Segal and Karchmer could not be surcharged for the payments to Perry, but that Freedman should be so surcharged.

A. Surcharge of Karchmer and Segal.

The district court correctly held that the exculpatory provisions of the 1952 Trust Agreement exonerated the trustees except for wilful misconduct and that Karchmer and Segal were not involved in any wilful misconduct in their actions concerning these payments.

The 1952 Trust Agreement provided, in relevant part:

> "4. The Trustee shall not be liable for the making, retention, or sale of any investment or reinvestment as made by them, as herein provided, nor for any

loss to, or diminution of the Fund, *except due to their own wilful misconduct.*"

"5. The Trustees shall be protected in acting upon any paper or document believed by them to be genuine and to have been made, executed, or delivered by the proper party purporting to have made, executed or delivered the same, and shall be protected in relying and acting upon the opinion of legal counsel (including opinion of legal counsel who is or may be a trustee hereunder) in connection with any matter pertaining to the administration or execution of this Trust Fund. *No Trustee shall be liable for any action taken or omitted by him unless such act or omission is the result of wilful misconduct, nor for the acts of any agent, employee, or attorney selected by the Trustees with reasonable care, nor for any act or omission of any other Trustee.*" (Emphasis added.)

The plaintiffs, arguing that the amendments to the trust agreement "in effect creat[ed] new trusts . . .", contend that the effective date of the trust agreement was not 1952, but October 28, 1961 and September 28, 1964, the dates of the amendments. This point has significance because between 1952 and 1961 Section 501(a) of the LMRDA became law. That section reads:

> "A general exculpatory provision in the constitution and bylaws of such a labor organization or a general exculpatory resolution of a governing body purporting to relieve any such person of liability for breach of the duties declared by this section shall be void as against public policy."

Thus, according to plaintiffs, Section 501(a) invalidates the trustee exculpatory clause, at least as it applies in this case.

There is no reason to treat the amendments of 1961 and 1964 as anything other than they purported to be,—that is amendments to the basic agreement which otherwise remained in full force and effect. The amendments made no change whatsoever in the original agreement as far as the exculpatory clause of that agreement is concerned.

Moreover, even if the effective date of the agreement were held to be subsequent to the enactment of Section 501(a), the plaintiffs could not prevail. The ban of Section 501(a) against all "general exculpatory provisions by a labor organization in its constitution, by-laws or resolutions" does not apply to a standard trustee exculpatory clause of a trust agreement. Neither the express language, the legislative history of the section or the purpose of the section indicate the desire of Congress to include trustee exculpatory provisions within the general ban on exculpatory provisions. The language of the section is clearly aimed at union officers, not trustees; nor can a trust be equated with "a labor organization." The purpose of Congress in enacting Section 501(a) supports this literal interpretation of the provision. The section was aimed at stopping the pilfering of union funds by union officers, not at the conduct of trustees acting in their capacity as fiduciaries.

B. Surcharge of Freedman

The district court found that Freedman showed a "reckless indifference" to his duty as a trustee and therefore should be surcharged for the lump sum pension paid to Perry. The facts as shown in the record amply support this finding.

Freedman's opinion letter of January 16, 1969, stated that Perry was "entitled to credit for covered employment for the period through October 20, 1974 based on his contract with NMU, pursuant to which 'contributions

have been made by the Union to the Plan for the period through October 20, 1974,' and that Perry was 'entitled to receive immediate payment.' " *Morrissey v. Curran*, 351 F. Supp. 775, 783 (1972). As the district court noted, "This was wrong, on both counts." In the first place, prepayment of contributions is not authorized by the trust agreement, which contains the only provision authorizing payments to the fund. Second, there was absolutely no basis for Freedman's conclusion that the payment of the lump sum to Perry could be made immediately. It is entirely clear "that the pension was payable on October 20, 1974, and then only if the trustees at that time exercised their discretion under Article V, Section 8 to pay Perry a lump sum."

These are not complex legal questions on which reasonable men could disagree. Freedman's 1969 legal opinion constituted gross error and warranted the conclusion of the district court that he had acted in reckless disregard of his duty as a trustee.

III.

A. Liability of Curran and Wall for payments to the Pension Fund

The evidence in the record shows that Curran and Wall acted in good faith, relying on the advice of the union's general counsel. In a matter such as this in which the issue is reasonably open to legal dispute an officer acting in good faith is justified in relying on counsel and is not liable, if he so acts, for breach of trust.

B. Payments by the Pension Fund

The district court said there "is no evidence that on January 16th Curran directed the payment to Perry of $222,200 or directed Freedman to furnish the legal opinion

to the trustees. Consequently, on the evidence presented, plaintiffs have failed to prove that Curran breached his fiduciary duty under LMRDA." *Morrissey v. Curran, supra,* at 785.

Plaintiffs now argue that Curran dominated the trustees and it was through this power that the payment to Perry was made. This is properly a factual question for the district court which ruled on the basis of all the evidence presented that the plaintiffs failed to prove their contention. There is no reason for believing that the ruling of the district court on this question was clearly erroneous.

The district court held that the evidence established that Wall played no part in the events of January 16th, and the payment to Perry. There is nothing in the record to indicate that that ruling is incorrect.

C. Liability of Curran and Wall for payments to Shapiro as Trustee

Plaintiffs contend that Curran and Wall are liable for any payments made to Shapiro as trustee. In February, 1972, after the ruling of this Court, the union deposited $460,363 in a bank account under union control. This money was part of the funds paid by the trustees to the NMU to comply with the court order. The union estimated that this was the amount necessary to fund the pensions for current employees. A trust agreement was drawn up, and Shapiro was named as trustee. Plaintiffs now attack this action.

Plaintiffs' contentions fail for several reasons. First, the union never paid the money to Shapiro; the trust agreement was never executed. Even if the money had been paid, the proposed pension plan for current employees was for future payments. Consequently, the establishment of the fund was permissible and not prohibited by this court's prior decision.

IV.

The district court awarded counsel fees, accountants' fees and expenses to plaintiffs in the amount of $111,864.00, and directed that this amount be paid out of the judgment recovered by the union. This is the correct approach; the union, not the pension fund should shoulder these costs. The fees requested are adequate but not excessive.

Affirmed.

AGREEMENT BETWEEN NATIONAL MARITIME UNION AND PERRY.

AGREEMENT made this 2d day of August, 1966, and between the NATIONAL MARITIME UNION OF AMERICA, AFL-CIO (hereinafter referred to as the "NMU"), and WILLIAM PERRY (hereinafter referred to as "Perry").

WHEREAS, Perry has been employed by NMU in the capacity of Assistant to the President since the day of , 1958, pursuant to Article 13, Section 1(f) of the Constitution of the National Maritime Union of America, AFL-CIO; and

WHEREAS, Perry has been of invaluable service to the President of the NMU in the performance of his vast responsibilities and important duties in the conduct of the union activities, and Perry also has been of great assistance to all the National Officers in assisting them in their duties and in otherwise performing important duties on behalf of NMU; and

WHEREAS, the NMU, its President and the National Officers desire that Perry continue to serve as Assistant to the President of NMU, as an inducement to him to continue to serve in this capacity and intending to be legally bound hereby, it is mutually agreed by and between the parties as follows:

1. The parties hereby agree that Perry shall continue in the employ of NMU to serve as Assistant to the President of NMU until October 20, 1974. Upon the expiration of said original term, said employment shall continue thereafter under the same terms for successive additional terms of four (4) years each, unless either party notifies the other in writing, at least six (6) months prior to the expiration

of any term of this Agreement, of intent to terminate said Agreement, at the end of the then current term. In absence of such notice, this Agreement shall continue from four years to four years until so terminated.

2. Perry's compensation during the term of this Agreement, or any renewal or extension thereof, shall be the same as the compensation paid to him as of July 1, 1966, including all contributions to the NMU Officers Pension Plan and any insurance or other fringe benefits presently available or payable, or which may become payable or available in the future to the NMU National Officers during the term of this Agreement or renewal or extension thereof. The rights, compensation and benefits conferred hereunder shall be in addition to those presently and hereafter enjoyed by and accruing to Perry (including but not limited to severance pay and pension benefits, inter alia), and shall not be deemed to take away, change, diminish or limit any of same in any manner.

3. In the event that this Agreement or Perry's employment should be terminated, with or without cause, prior to the expiration date hereof or of any renewal or extension, or in the event that Perry should become incapacitated from performing his duties, either totally or partially, by reason of illness, injury, physical incapacity or any other cause, Perry shall be entitled to continue to receive his said salary in full, including contributions to the NMU Officers Pension Plan and any other fringe benefits payable to the National Officers as under paragraph 2 hereof, during the balance of the term hereof or any renewal or extension. In the event, however, of such termination, or if such incapacity should be substantial or total, Perry shall have the option to demand and receive at one time or over any period that he shall specify an amount equal

to the said total salary, including contributions to the NMU Officers Pension Plan and any other fringe benefits payable to National Officers which he would have received during the balance of the original term or any renewal or extension hereof.

4. For the purposes of determining Perry's entitlement to participation in and benefits from, the NMU Officers Pension Plan, the parties recognize, understand and agree that Perry shall be deemed to be a "Participant" in "Covered Employment" (as defined in the said Plan) during the full period of the original term of this Agreement, and the full four-year period of each renewal or extension thereof, notwithstanding anything to the contrary contained in paragraph 3 or any other provision of this Agreement.

5. This Agreement and all the terms and conditions hereof shall be binding upon the parties, and their heirs, beneficiaries, representatives, successors and assigns.

IN WITNESS WHEREOF, the parties have hereunto duly executed this Agreement the day and year first above written.

NATIONAL MARITIME UNION OF AMERICA, AFL-CIO

By JOSEPH CURRAN,
Joseph Curran,
President

WILLIAM PERRY
William Perry

SHANNON WALL,
Shannon Wall,
Secretary-Treasurer

MEL BARISIC,
Mel Barisic,
Vice-President

RICK MILLER,
Rick Miller,
Vice-President

JAMES J. MARTIN,
James Martin,
Vice-President

ROBERT NESBITT,
Robert Nesbitt,
National Representative

PETER BOCKER,
Peter Bocker,
National Representative

LEO STRASSMAN,
Leo Strassman,
National Representative

Intending to be legally bound hereby and in consideration of the reliance hereto by the parties to the foregoing Agreement, we hereby acknowledge and agree that paragraph 4 of the said Agreement shall be binding upon us and our successors in determining William Perry's entitlement to participation in, and benefits from, the NMU Officers Pension Plan.

ABRAHAM E. FREEDMAN,
Abraham E. Freedman,

MARTIN E. SEGAL,
Martin E. Segal,

LEON KARCHMER,
Leon Karchmer,

Trustees, National Maritime Union Officers Pension Plan.

AGREEMENT AND DECLARATION OF TRUST BETWEEN NATIONAL MARITIME UNION AND COOPER, ET AL.

AGREEMENT AND DECLARATION OF TRUST first dated as of December 29, 1952 and revised this 28th day of October 1961, by and between the NATIONAL MARITIME UNION OF AMERICA, AFL-CIO (hereinafter referred to as the "Union"), and HERMAN E. COOPER, MARTIN E. SEGAL and LEON KARCHMER (hereinafter referred to as the "Trustee"), as Trustees under this Agreement and Declaration of Trust.

WITNESSETH:

WHEREAS, the National Maritime Union of America, AFL-CIO, by agreement with Herman E. Cooper, Martin E. Segal and Leon Karchmer, dated as of December 29, 1952, established a trust fund for the exclusive benefit of its elected officials through payments, upon the terms, and subject to the conditions and limitations therein set forth; and

WHEREAS, by custom, practice and usage the term "elected official" has historically been deemed to include officials duly appointed in accordance with the Union's constitutional procedures; and

WHEREAS, said fund has continuously been administered by the Trustees from the date of its establishment and is presently being so administered; and

WHEREAS, the Union desires to extend the benefits contemplated by the aforesaid Agreement to those of its employees who represent the Union in the conduct of its business (commonly referred to as "Representatives") and to those of its employees who are engaged in supervisory or professional activities, none of whom is repre-

sented by another labor organization for purposes of collective bargaining; and

WHEREAS, the Union desires to amend and revise the aforesaid Agreement to reflect the foregoing understandings and purposes, effective as of December 29, 1952; and

WHEREAS, the Trustees have declared and do hereby declare that they will receive, hold, administer and dispose of all money and securities paid, transferred, or delivered to them as Trustees, pursuant to the provisions of this Agreement and Declaration of Trust, with the duties and powers and for the uses and purposes herein set forth, and none other;

NOW, THEREFORE, in consideration of the premises, it is mutually agreed between the parties that the aforesaid Agreement be and the same hereby is amended and revised, effective as of December 29, 1952, as follows:

I. DEFINITIONS.

Wherever used in this Agreement and Declaration of Trust:

1. "Agreement" means this Agreement and Declaration of Trust.
2. "Union" means the National Maritime Union of America, AFL-CIO.
3. "Trustees" means the Trustees designated herein, as well as their successors designated in the manner herein provided.
4. "Fund" means all moneys and property paid to the Trustees and all securities purchased by the Trustees, pursuant to the provisions of this Agreement, together with all interest or other income thereon, and the net proceeds of any sale or other disposition of such securities.

5. "Plan" means the Pension Plan adopted by the Trustees, pursuant to the terms of this Agreement.
6. "Official" or "Officer" means a person holding any of the following offices, in accordance with the provisions of the Union constitution:
   a) National President
   b) National Secretary
   c) National Treasurer
   d) National Vice-President
   e) National Representative
   f) National Port Committee Member
   g) Branch Agent
   h) Field Patrolman
   i) Patrolman
7. "Representative" means any person, other than an elected National Representative referred to in Section 6 of this Article, who is employed by the Union in the capacity of "Assistant to the President" or "Organizer."
8. Employees engaged in "supervisory or professional activities" means the following employees of the Union: "Maintenance Supervisor", "Bookkeeping Supervisor", "Records and Supplies Supervisor", "Executive Secretary", "Publicity Director and Editor of The Pilot."
9. "Participant" means an Officer, Union Representative, or any employee who is engaged in a supervisory or professional activity.

II. Source of Assets of the Fund.

1. In consideration of this Agreement and upon its execution, the Union has made an initial payment of $80,000.00 to the Trustees.

2. Commencing with the calendar quarter of January 1, 1953 to March 31, 1953, and for each calendar quarter thereafter, the Union has been making payments to the Trustees a sum of money equal to 23% of the compensation paid by the Union to the participants for the calendar quarters then ending. The Union agrees to continue making such payments in the same manner as heretofore, i.e., within ten days after the end of each calendar quarter.

III. THE TRUSTEES.

A. *Terms of Office and Successors.*

1. The Trustees designated herein shall continue to serve as Trustees for life, unless they or any one of them resign or become incapable of discharging their duties as Trustees. A resignation must be submitted in writing to the President of the Union and the question of a Trustee's incapacity to discharge his duties shall be conclusively determined by the other Trustees.

2. In the event of a vacancy created by the death, resignation or incapacity of one of the Trustees, the remaining two Trustees shall immediately meet and designate a successor Trustee, who shall serve for the same term and upon the same terms and conditions as his predecessor. In the event that the remaining Trustees are unable to designate a successor Trustee, such designation shall be made by a majority vote of the National Officers of the Union.

3. During the interim period prior to the designation of a successor Trustee, the remaining Trustees acting in the manner herein provided, shall administer the affairs of this trust fund.

B. *Meetings and Voting.*

1. Decisions of the Trustees shall be made by the concurring vote of the majority of the Trustees. The vote of the Trustees may be cast by them in person at a meeting, or may be evidenced by a written instrument signed by them, or telegrams from a requisite number of Trustees, after written notice to all of the Trustees of the question to be decided.

2. Any Trustee may call a meeting of the Trustees at any time by giving written notice not less than forty-eight hours in advance of the time and place thereof to each Trustee. Meetings of the Trustees may also be held at any time without notice if all the Trustees consent thereto.

3. A majority of the Trustees, present in person at any meeting, shall constitute a quorum for the transaction of business.

C. *Powers and Duties.*

1. The Trustees shall continue to administer the Pension Plan, heretofore adopted by them on February 16, 1953, pursuant to this Agreement and Declaration of Trust. Consistent with the purposes of this Agreement the Trustees shall have full and sole discretion to determine the amount and nature of such benefits and the terms and conditions of payment and shall have the power to conclusively determine all questions concerning the payment of benefits to any individual recipient or proposed recipient.

2. The Trustees shall deposit all moneys received by them in such bank or banks as they may designate for that purpose and in such manner as the Trustees, in their sole discretion, shall determine. The Trustees shall invest and reinvest such moneys as in their sole discretion they may determine are not required for current expenditure in any securities and without distinction between principal and

income. The Trustees, in their discretion, may keep such portion of the Fund in cash or cash balances as the Trustees may, from time to time, deem to be in the best interests of the Fund.

3. The Trustees are authorized and empowered:

a) To sell, exchange, convey, transfer, or otherwise dispose of any property held by them by private contract or at public auction.

b) To make, execute, acknowledge, and deliver any and all documents of transfer and conveyance and any and all instruments that may be necessary or appropriate to carry out the powers herein granted.

c) To register any investment held in the Fund in their own names or in the name of a nominee and to hold any investment in bearer form, but the books and records of the Trustees shall at all times show that all such investments are part of the Fund.

4. The Trustees shall not be liable for the making, retention, or sale of any investment or reinvestment as made by them, as herein provided, nor for any loss to, or diminution of the Fund, except due to their own wilful misconduct.

5. The Trustees shall be protected in acting upon any paper or document believed by them to be genuine and to have been made, executed, or delivered by the proper party purporting to have made, executed or delivered the same, and shall be protected in relying and acting upon the opinion of legal counsel (including opinion of legal counsel who is or may be a trustee hereunder) in connection with any matter pertaining to the administration or execution of this Trust Fund. No Trustee shall be liable for any action taken

or omitted by him unless such act or omission is the result of wilful misconduct, nor for the acts of any agent, employee, or attorney selected by the Trustees with reasonable care, nor for any act or omission of any other Trustee.

6. No party dealing with the Trustees in relation of this Trust Fund shall be obliged to see to the application of any money or property of the Trust Fund; or to see that the terms of this Trust Fund have been complied with, or be obliged to inquire into the necessity or expediency of any act of the Trustees, and every instrument executed by the Trustees shall be conclusive in favor of every person relying thereon: (a) that at the time of delivery of said instrument the Trust Fund hereby created was in full force and effect, (b) that said instrument was executed in accordance with the terms and conditions contained in this Agreement, and (c) that the Trustees were duly authorized and empowered to execute such instrument.

7. The receipt given by the Trustees for any money or other property received by them shall effectually discharge the person or persons paying or transferring the same, and such person or persons shall not be bound to see to the application, or be answerable for the loss or misapplication thereof.

8. The Trustees may deduct from and charge against the Trust Fund any taxes paid by them, which may be imposed upon the Trust Fund, the income, property, or transfer thereof, or of any part thereof, or upon or with respect to the interest of any individual therein, which the Trustees are required to pay. The Trustees, in their discretion, may contest the validity or amount of any tax, assessment, claim or demand which may be levied or made against, or in respect of the Trust Fund, or against or in respect of any part of the Trust Fund, the income, property or transfer thereof, or in any matter or thing connected therewith.

9. The Trustees shall be empowered to obtain and determine compensation for legal counsel, accounting, technical, actuarial and investment services and such administrative assistance as they may, in their discretion find necessary. If any Trustee shall have a financial interest in a firm whose services are desired by the Fund, that Trustee shall not participate in discussions or decisions relating to the retention of such firm or the terms and conditions of compensation for the services to be rendered.

10. The Trustees may delegate any of their ministerial powers and duties hereunder to one or more of the Trustees or to one or more officers of the Union designated by them for that purpose.

11. In the event of any ambiguity, the Trustees shall have the power to construe this Agreement and Declaration of Trust, and their construction of the same shall be final and conclusive.

12. The Trustees shall have all other powers necessary and proper to the carrying out of the purposes of the Trust.

IV. The Union.

1. The Union shall promptly pay to the Trustees the contributions due, in accordance with the provisions of this Agreement, or of the Pension Plan adopted pursuant to this Agreement, or, if the Trustees so direct, to deposit such contributions in such depository as the Trustees shall designate.

2. The Union shall provide the Trustees with all records and information requested by the Trustees and designated by the Trustees as being necessary to the performance of their duties.

3. Liability for the payment of the pensions and benefits provided for under the Pension Plan adopted pursuant to the within Agreement and Declaration of Trust and any other liability arising under or out of this Agreement shall be limited exclusively to the assets of the Trust Fund, and in the event that such assets are at any time insufficient to provide for the payment of any pension or benefit payments due under the Pension Plan, or any other such liability, no liability for the payment thereof shall attach to or may be asserted against the Trustees.

V. Miscellaneous.

1. Notwithstanding anything to the contrary contained in this Agreement and Declaration of Trust, as now expressed or hereafter amended, it shall be impossible at any time for any part of the trust corpus or income to revert to the Union or to be used for or diverted to any purpose other than the exclusive benefit of the eligible participants and their beneficiaries, through the payments, upon the terms, and subject to the conditions and limitations contained in the Pension Plan adopted pursuant to this Agreement, or in the event of termination, in such manner as shall be designated by the Trustees.

2. No participant, or any individual claiming by, through, or under any participant, shall have any right, title or interest in or to or claim against the trust fund or any part thereof, except the right to receive pensions or benefits in the amounts and subject to the terms and conditions provided in the Pension Plan.

3. Neither the pension nor any other benefit under the Pension Plan, nor the assets in the individual account of a participant entitled to receive such pension or benefits shall be subject in any manner to anticipation, alienation,

sale, transfer, assignment, pledge, encumbrance or charge, and any attempt so to anticipate, alienate, sell, transfer, assign, pledge, encumber or charge the same shall be void; nor shall any such pension or other benefit or such assets be in any manner, whether by action of the participant or his beneficiary or by operation of law, liable for or subject to the debts, contracts, liabilities, engagements or torts of the person entitled to such pension or other benefit.

4. Every individual receiving or claiming a pension or other benefit under this Agreement and Declaration of Trust or Pension Plan enacted pursuant hereto, shall be conclusively presumed to have been competent until the date on which the Trustees shall have received written notice, in a form and manner acceptable to them, that such an individual is an incompetent or a minor, for whom a guardian or other person legally vested with the care of his person or estate shall have been appointed; provided, that the Trustees may, in their discretion, validly recognize actions by, and conduct transactions with, others acting, prior to the receipt of, or in the absence of such written notice, in behalf of an individual found by the Trustees to be an incompetent or a minor, if the Trustees shall find such actions or transactions to be in the best interests of such individual.

5. This agreement and the Trust Fund and Pension Plan established hereunder and pursuant hereto have been executed in the State of New York and all questions pertaining to the validity or construction of this instrument and of the acts or transactions of the parties hereto shall be determined in accordance with the laws of the State of New York.

6. In case any provisions of this Agreement shall be held illegal or invalid for any reason, said illegality or invalidity shall not affect the remaining parts of this Agreement, but this Agreement shall be construed and enforced as if said illegal and invalid provisions had never been inserted herein.

VI. TERMINATION.

1. The trust created by this Agreement and Declaration of Trust shall terminate: (a) When the Trustees, in their sole discretion, determine that the purposes of this Agreement can no longer be carried out; (b) Upon the affirmative vote of two-thirds of the membership of the Union, but in no event shall the trust be terminated by vote of the membership for a period of at least twenty years from the date of execution of this Agreement and Declaration of Trust.

2. If there shall be assets remaining in the Trust Fund upon the termination of this trust, such remaining assets shall be distributed and disposed of in such manner and upon such terms and conditions as the Trustees shall, in their sole discretion, determine.

VII. AMENDMENTS.

1. This Agreement and Declaration of Trust may be amended at any time by an instrument in writing, executed by the President of the Union and a majority of the Trustees.

VIII. NAME.

The fund established by this Agreement and Declaration of Trust shall be known as the "National Maritime Union Officers' Pension Fund", and the Trustees may conduct business under that name.

IN WITNESS WHEREOF, the Trustees and the National Maritime Union of America, AFL-CIO, by its duly authorized officers, have executed this Agreement and Declaration of Trust to evidence their acceptance of the trusts hereby created and their agreement to be bound thereby.

NATIONAL MARITIME UNION OF AMERICA, AFL-CIO,

By JOSEPH CURRAN, National President,

STEVE FEDEROFF, National Secretary-Treasurer,

DAVID M. RAMOS, National Vice-President,

TRUSTEES:

HERMAN E. COOPER,

LEON KARCHMER,

MARTIN E. SEGAL.

ad

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Supreme Court, U. S.
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OCT 2 1973
MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1973

No. 73-478

ABRAHAM E. FREEDMAN,

Petitioner,

v.

JAMES MORRISSEY, JOSEPH PADILLA, RALPH IBRAHIM, individually and on behalf of the members of the NATIONAL MARITIME UNION OF AMERICA,

Respondents.

RESPONDENTS' BRIEF IN OPPOSITION TO THE PETITION FOR A WRIT OF CERTIORARI

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Respondents.

RESPONDENTS' BRIEF IN OPPOSITION TO THE PETITION FOR A WRIT OF CERTIORARI

Preliminary Statement

The judgment, with which this petition is concerned, was made in favor of the trustees of the NMU Officers' Pension Plan, Abraham E. Freedman, Leon Karchmer and Martin E. Segal. The trustees, as trustees, are or should be vitally concerned with having that judgment sustained. Indeed the remaining parties below also have interests adverse to Mr. Freedman in his individual capacity. Curran and Wall as Landrum Griffin Act (LMRDA) fiduciaries have a duty to sustain the judgment against Mr. Freedman individually. Mr. Perry, against whom Mr. Freedman has the right of subrogation, is also adverse to him.

However, as it appears from the caption of the petition and from the proof of service of the petition, filed with the Clerk of this Court, the plaintiffs alone have been named as respondents and made parties.

Under these circumstances the petition should be dismissed. It would be an idle ceremony to grant a writ against the plaintiffs when the judgment was entered in favor of other parties (See *Stern and Gressman, Supreme Court Practice,* 3d Ed., page 238).

Previous Proceeding

The respondents, members of the National Maritime Union (NMU), with the consent of the United States District Court, brought an action under LMRDA (29 U.S.C. § 501) against Joseph Curran, president of NMU, his assistant William Perry, Shannon Wall, secretary treasurer of NMU and the three trustees of the NMU Officers' Pension Plan, including the petitioner, Abraham E. Freedman, to recover money wrongfully paid by NMU to the trustees and to surcharge the trustees for money wrongfully paid out by them and for other relief not here involved.

An interlocutory summary judgment was entered directing the defendants including the trustees to account. This interlocutory judgment was affirmed by the Court of Appeals for the Second Circuit. This Court thereafter denied applications for writs of certiorari.

Statements, in the nature of accounts, were served and filed by the defendants. The plaintiffs filed objections to the account. These objections were tried.

After trial the District Court found that the NMU officers had wrongfully paid to the trustees $520,283.38, a substantial part of which (about $80,000) had been paid for the account of William Perry, an intimate friend of Joseph Curran, and directed that the trustees refund that sum with interest to NMU. The District Court also found that $222,200.00 had been wrongfully paid out to William Perry by the trustees.

The District Court held that two of the three trustees were negligent but were otherwise innocent of wrongdoing and that the third trustee, the petitioner here, was so recklessly indifferent to his duties as trustee that he should be surcharged for the wrongful payment to William Perry. Judgment was entered against the petitioner for $222,200.00 plus interest. This judgment was affirmed by the Court of Appeals for the Second Circuit and is the subject of the pending application.

Incidentally, judgment was also entered against William Perry for the amount wrongfully received by him with interest. That judgment was also affirmed by the Court of Appeals. The petitioner, Freedman, is entitled to be indemnified when the judgment against Mr. Perry has been paid. The Fund may not collect both the judgment against Freedman and the judgment against Perry. When Freedman has satisfied the judgment against him, he will, by operation of law, take over all rights to the judgment against Perry.

The Real Questions Presented

1. May a trustee of a pension fund established by a labor organization be held to account under LMRDA, 29 U.S.C. § 501, for a wrongful use of the funds of the labor organization entrusted to his care by the labor organization?

2. May a person appointed by a labor organization as a trustee of a pension fund be held to account under LMRDA, 29 U.S.C. § 501, for a wrongful use of the funds entrusted to his care by the labor organization?

3. May a trustee under a pension fund established by a labor organization and who, in fact, is under the control of the labor organization, be held to account under LMRDA, 29 U.S.C. § 501, for a wrongful use of the funds entrusted to his care by the labor organization?

4. In an action brought under LMRDA, 29 U.S.C. § 501, to recover money wrongfully paid by a labor organization to a pension fund, may a United States District Court surcharge a trustee for a wrongful use of money so paid?

Respondents' Statement of the Case

The National Maritime Union established, by a membership vote, a Pension Trust Plan for its officers elected by a membership vote.* Funds realized from membership dues were used to fund this Pension Plan.

It came to the plaintiffs' attention that this Officers' Pension Plan had been and was being used by Joseph Curran, as an improper means to siphon large sums of money from the Union to William Perry, an intimate friend of Joseph Curran, and to others. William Perry was not an elected officer of NMU. He was Joseph Curran's hired hand.

With the approval of the District Court, the plaintiffs, members of NMU, brought this action to stop such practice and to recover the money so wrongfully used.

The District Court found that the trustees had wrongfully paid $222,200.00 to William Perry and entered judg-

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* Typical of his tactics the petitioner has printed in his appendix the 1961 amendment to the 1952 Agreement and Declaration of Trust while describing the same in the index as "Agreement and Declaration of Trust * * * dated December 29, 1952." The difference between the two documents is radical and critical. The amendment which petitioner has printed was declared void on the first round of appeals.

The original Agreement and Declaration of Trust dated December 29, 1952 created "for the exclusive benefit of * * * elected officials" of NMU is printed in the cross petitioner's supplemental appendix (SA 51 *et seq.*).

References to the petitioner's appendix filed in this Court will be preceded by A.

References to the cross petitioners' supplemental appendix filed in this Court will be preceded by SA.

ment surcharging the petitioner, Abraham E. Freedman, in that amount with interest.

As a basis for the surcharge the District Court found that the petitioner (A30-31):

> "Freedman acted simultaneously as a trustee, counsel to the trustees, and counsel to NMU. He had drawn the Perry contract, and represented Perry in the earlier stages of this litigation. The evidence shows that he dictated his legal opinion from the top of his head while in Philadelphia and had his name signed to it by Sovel. He showed a reckless indifference to his duty as a trustee as well as the interests of his fellow trustees, who relied on his opinion. Indeed, he was indifferent to his duty to NMU as well, as he knew that Perry's participation in the Officers Pension Plan had been challenged by the plaintiffs (which challenge was later sustained by this court and the Court of Appeals). Moreover, he knew, or should have known, that NMU made quarterly payments to the Officers Pension Plan equal to 26% of the compensation paid *for that quarter,* and, as pointed out by Karchmer, the payments were made without specific application to any beneficiary, as there were no separate accounts for beneficiaries.
>
> The court concludes with regret that Freedman acted with reckless indifference to his duty as trustee. Therefore, as trustee, he will be subject to surcharge for the lump sum pension paid to Perry."

Freedman's accountability thus rests not only upon his neglect but also upon his "reckless indifference to his duties as trustee".

Freedman testified at pretrial and at trial (394-409a; 502-580a).* The District Court had an opportunity to ob-

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* References to the joint appendix filed in the Court of Appeals will be followed by a letter or letters of the alphabet in lower case.

serve him as a witness. Freedman's behavior was such that a finding of "recklessness" on his part was forced in spite of the understandable reluctance of the District Court (A31). There has been no exceptional showing that would warrant the review here of these findings confirmed by the Court of Appeals (*Graver Mfg. Co.* v. *Linde Co.*, 336 U.S. 271, 275).

The quality of Freedman's behavior may not be weighed in a vacuum. Reference must be made to the setting—to the frame in which he acted. He became a trustee of the NMU Officers' Fund in 1964 after the enactment of the LMRDA. He was not only a trustee, he was also attorney for NMU and the trustees. He had acted as attorney for Curran, Wall and Perry in this action. As the District Court found, Freedman allowed himself to be dominated by Curran (A33). He knew that Perry was a close and intimate friend of Curran. At Curran's beck, he had drawn the strange contract. This contract had attempted to assure Perry a salary up to October 21, 1974 (Plaintiffs' Exhibit 13, 800z-800aa) regardless of earlier termination for any cause short of a voluntary retirement. But favorable as it was to Perry it failed to make any provision for the acceleration of Perry's pension (800z).

In his haste to humor Curran and Perry, Freedman did not even inquire into the circumstances of Perry's leave taking. At the trial he professed to believe that these circumstances made no difference (565a). He knew that whatever these circumstances may have been, Curran had acted in strict accord with Perry's wish.

Since November, 1968, after the plaintiffs' preliminary notice had been served, Perry had been laying the groundwork for retirement. He sought and obtained a statement of his pension (lump sum). In December he had Curran pay to the trustees a contribution of $41,250.01 (508a) on his account up to October, 1974. These steps are not reconcilable with a firing in good faith by Curran on January 16, 1969.

Freedman had never given thought to Perry's rights on a voluntary retirement *versus* his rights upon an *ex parte* termination of the contract by NMU (564-566a). There is no suggestion that he had ever given thought to the matter of the acceleration of Perry's pension rights upon an early termination; that he had ever given thought to the problem of how pension rights under the Plan, a Plan approved by the membership—could be altered by a simple contract; or that he had ever given thought to the matter of discounting the accelerated payments to Perry (546a-551a).

The District Court was quite justified in characterizing Freedman's opinion as having been given from "the top of his head"—an opinion on the basis of which Perry would pocket nearly $400,000 including his accelerated salary from NMU.

Freedman's opinion (888-889a) was dictated on the very day of Perry's retirement over the telephone from Philadelphia, transcribed in New York and signed "Abraham E. Freedman" by his assistant. All this came after the plaintiffs' preliminary notice and at a time when the plaintiffs would shortly be ready to file a complaint. The whole affair smacked of a race to beat the plaintiffs to the gun.

The District Court went on to find that, while the other two trustees had acted carelessly in making such payment, their culpability did not reach the petitioner's height of recklessness.

Petitioner's Alleged Reason for His Application

None of the reasons advanced by the petitioner falls within the guidelines (Rule 19) for the granting of writs of certiorari and none would otherwise justify the granting of such a writ.

As to Petitioner's First Reason

The petitioner argues that the District Court was without jurisdiction to surcharge Abraham E. Freedman under the provisions of LMRDA, Title 29 U.S.C. § 501; that the trustees of the Officers' Pension Plan were not representatives of a labor organization.

This argument fails for several reasons:

(1)

The decision below does not conflict with decisions of other circuits. In fact, it is consistent with all decisions in which the point was raised. [See *Hood* v. *Journeymen Barbers, Hairdressers, etc.* (CA7), 454 F.2d 1347, in which the identical argument was made; *Robinson* v. *Weir* (D.C. Neb.) 277 F. Supp. 581, in which the surety on a trustee's bond was subjected to suit under § 501(a); *Aho* v. *Bintz* (D.C.Minn.), 290 F. Supp. 577, in which representatives of an international union were held to be "representatives" of the local union under § 501(a) when occupying positions of trust with regard to the local and its members.]

The source of the fund held by the trustees was dues paid by NMU members. No part of the fund represented outside contributions. The usual and customary union pension or welfare funds have resulted from negotiations with employer groups and the employers have made the contributions to the fund. However, this fund is unique in that the union members themselves have created the fund for the benefit of their elected officers. Under these circumstances the trustees could represent none other than the labor organization which created the trust. Unlike the trustees in *Tucker* v. *Shaw* (E.D.N.Y.), 308 F.Supp. 1, relied upon by the petitioner, the trustees here did not represent the employer organizations.

As the District Court said (A32):

> "For the purposes of Section 501(a), the funds paid by NMU to the Officers' Pension Plan and by it to Perry were funds of NMU."

The respondents were enforcing rights of the union as they had a right to do under § 501. They were not enforcing rights of outside interests. Unless the union can protect and conserve the trust against the wrongful acts of the trustees, then the fund is without protection.

(2)

The trustees were selected and designated by NMU to hold money contributed solely by NMU. Having been so selected and designated, they necessarily were "representatives" of the Union.

(3)

On the facts in this case the trustees were under the domination and control of Joseph Curran, as President of NMU, and for that reason alone must be regarded as union representatives under § 501(a). As the District Court further found (A33):

> "The evidence indicates that Curran dominated the people who had anything to do with the payment from the Officers' Pension Plan to Perry."

(4)

The money had been wrongfully paid by NMU to the Officers' Pension Plan and had been wrongfully paid out by the trustees of the Plan. It follows that the trustees were properly joined as defendants in the action to recover those funds. In fact, they were necessary parties. That being so, even if § 501(a) were not intended to embrace trustees within the term "representatives", the Dis-

trict Court had pendent jurisdiction to determine the surcharge issue. Only by exercising such pendent jurisdiction could complete relief be granted.

Here the claim against the trustees under § 501(a) to recover the money wrongly paid to the Plan for the account of non elected persons including William Perry and the claim against the trustees for their wrongful payment out to William Perry "derive from a common nucleus of operative facts". The parties are the same in the proceeding to enforce each such claim. All of the elements of a proper pendent jurisdiction are present. As Mr. Justice Brenman said in *United Mine Workers* v. *Gibbs,* 383 U.S. 715, at page 725:

> "The state and federal claims must derive from a common necleus of operative fact. But if, considered without regard to their federal or state character, a plaintiff's claims are such that he would ordinarily be expected to try them all in one judicial proceeding, then, assuming substantiality of the federal issues, there is *power* in federal courts to hear the whole."

As Mr. Justice Brenman pointed out (p. 726) "pendent jurisdiction is a doctrine of discretion" in the Court and its exercise will not be disturbed unless abused.

As to the Petitioner's Second Reason

As a second reason the petitioner argues that he was judged by standards of conduct which differed from those by which his co-trustees were judged, and that he was thereby denied due process of law.

His argument here begs the question. The same standards were in fact applied. But by those same standards the Courts below found that Freedman was more culpable than his co-trustees. While the co-trustees had acted care-

lessly and negligently, they had had no prior knowledge of the plaintiffs' notice that a payment to Perry would be wrong and they did have Freedman's advice, as counsel, that the payment to Perry would be proper.

As shown above the Court below distinguished Freedman's position by pointing to certain facts which did not relate to his co-trustees.

There is nothing strange or unusual or lacking in due process in holding one trustee liable and his co-trustees blameless when the facts justify a distinction.

As to Petitioner's Third Reason

The petitioner has made the strange assertion that NMU was not damaged by the wrongful payment to William Perry.

This is indeed a desperate argument. Freedman in effect says that the creator of a trust has no standing to demand an accounting for improper trustee action.

The argument falls of its own weight. NMU is vitally interested in keeping the Pension Plan adequately funded. If the Fund could be depleted by improper payments, the Union would assuredly be morally if not legally obligated to restore the fund to the point of actuarial soundness. It is obvious that NMU retained an economic interest in the Fund and was damaged when the Fund was damaged.

The argument seems to be that the fund was adequately funded even after the payment to Perry and, that being so, the surplus was up for grabs and no one was hurt. This is absurd, particularly absurd when coupled with the fact, as found by the District Court, that "Curran dominated the people who had anything to do with the payment from the Officers Pension Plan to Perry" (A33). If the union, through its members, may not act, then who

can or will? If the members here had not acted, the Court could have done so on its own motion. Obviously the trustees would never have acted.

As to Petitioner's Fourth, and Last, Reason

The petitioner argues that the Court below did not properly apply the New York law. He argues that under New York Trust Law "willful misconduct" must be equated with "intentional wrongdoing".

If by this he means that malice or an intention to do harm are necessary elements, the petitioner has misinterpreted the law of New York. The New York law, as well as the law of most common law jurisdictions, defines "willful misconduct" as either an act intentionally done in reckless disregard of consequences *or* a negligent act done intentionally. Neither malice nor intention to harm is a necessary element of willful misconduct. Whether or not the behavior of a trustee amounts to willful misconduct is generally a question of fact and left to the triers of facts.

Thus Mr. Justice Frankenthaler in *Harvey* v. *Guaranty Trust Co.* (Sup.Ct., N.Y.Co.), 134 Misc. 417, aff'd 229 App. Div. 774, aff'd 256 N.Y. 526, quoted with approval from *May* v. *New York Motion Picture Corp.*, 45 Cal. App. 396, as follows at page 427:

> "In civil cases, the word 'willful,' as ordinarily used in courts of law, does not necessarily imply anything blamable, or any malice or wrong toward the other party, or perverseness or moral delinquency, but merely that the thing done or omitted to be done was done or omitted intentionally. It amounts to nothing more than this: that the person knows what he is doing, intends to do what he is doing, and is a free agent."

And the Court of Appeals for the District of Columbia approved the following instruction to a jury in *KLM* v. *Tuller*, 292 F.2d 775, cert. denied 368 U.S. 921:

> "* * * willful misconduct is the intentional performance of the act * * * in some manner as to imply reckless disregard of the consequences * * *."

The difference between simple negligence and willful misconduct has been described by these two illustrations:

First a driver passes a red traffic light. He is driving carelessly and does not observe the red light. He is guilty of simple negligence.

The second driver sees the red light but nevertheless decides to take the chance. However, he does not intend any harm. He is guilty of willful misconduct.

Freedman's behavior was comparable to the second driver. There were many red lights flashing in Freedman's face. He saw them and recklessly took a chance.

CONCLUSION

The petition should be denied.

Respectfully submitted,

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JOHN S. CHAPMAN, JR.
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Respondents and Cross-Petitioners,

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Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

RESPONDENT KARCHMER'S REPLY BRIEF

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1973

No. 73-478

ABRAHAM E. FREEDMAN,

Petitioner,

v.

JAMES M. MORRISSEY, JOSEPH PADILLA, and RALPH IBRAHAM, Individually and on Behalf of the Members of the NATIONAL MARITIME UNION OF AMERICA,

Respondents and Cross-Petitioners,

JOSEPH CURRAN, SHANNON WALL, WILLIAM PERRY, MARTIN E. SEGAL and LEON KARCHMER,

Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

RESPONDENT KARCHMER'S REPLY BRIEF

Preliminary Statement

This brief for defendant-trustee Leon Karchmer is directed to the only issue applicable to him as raised by "Question 6" of plaintiffs-respondents' Cross-Petition.*

* Brief of Respondents and Cross-Petitioners, p. 15.

Plaintiffs thereby seek to impose personal liability on the trustees for refraining from restitution proceedings upon a legally unenforceable claim against an innocent recipient of a good faith pension payment.

We submit that the cause expressed by the particular question presented for review does not warrant review on certiorari under Rule 19 of the Supreme Court Rules. There are here no conflicting Court of Appeals decisions, no important or novel questions of federal law or of substance, no special and important reasons for grant of certiorari. However, we are responding in what may be an excess of caution.

Plaintiffs seek a Writ of Certiorari for challenge of affirmance by the Court of Appeals of the District Court decision which totally exonerated Karchmer from any personal liability as one of three trustees of the NMU Officers Pension Fund (A35).

Such general absolution explicitly applied to the particular pension payment to Irving Brauch, the only recipient referred to in plaintiffs' formulation of the issue. Neither the trustees nor Brauch were found culpable for the payment. Nevertheless, plaintiffs contend that the trustees breached their fiduciary duties in not pursuing restitution, and ruefully complain that: "Neither of the courts below spoke on this issue".** As will appear, such *sub silentio* response to a non-issue was amply merited.

Plaintiffs first surfaced the present issue before the Court of Appeals (A35). At best, the question of trustee liability for not seeking restitution is hypothetical and depends on the primary determination that the recipient was legally obliged to make restitution. The District Court specifically found an insufficiency of proof to sustain trustee liability for the Brauch payment, and dismissed against

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** Brief of Respondents and Cross-Petitioners, p. 15.

the trustees for such prior payments to all non-officers except William Perry, a named defendant (A17).

Having been so cleared, the trustees were not chargeable with the duty to seek restitution except against Perry, individually adjudged to be a non-entitled pension recipient. 336 F. Supp. 1107. Judgment was entered on February 18, 1972 in favor of the NMU Officers Pension Plan against Perry for $263,307 (SA89). The trustees did proceed against Perry for restitution on this judgment.

The right and duty of the trustees to seek restitution against Brauch required his similar joinder as a defendant and similar entry of a personal money judgment. They had no equal duty or power to proceed against Brauch or any other non-party recipients of pension payments made and received in good faith under the state of facts and law then prevailing.

Unlike Brauch, Perry, as a named defendant, appeared and was represented by various counsel, who participated actively on his behalf in all stages of the litigation. Brauch was not named, had no notice of potential liability, did not appear, was not represented and was thereby denied a defense by plaintiffs' conscious choice or unexplained oversight. The District Court partial judgment of February 18, 1972 which invalidated pension payments made under the 1961 and 1964 amendments to the Trust Agreement was not *res adjudicata* as to Brauch, a non-party.

The situation involving liability for recouping the payment to Brauch presents both a different set of facts and a different proposition of law than applies to Perry. Brauch was included as a participant in the Officers Pension Plan by reason of the 1961 amendment to the Trust Agreement. He received his pension payment on April 16, 1966. This occurred before there was any intimation or notice of challenge to its propriety, unlike the case with Perry who was paid after such notice (351 F. Supp. 775,

784). It was not until January 11, 1972 that the amendment was first judicially declared invalid and that subsequent payments thereunder by the trustees to non-elected officers were enjoined.

The New York Statute of Limitations on possible recovery against Brauch ran out on April 6, 1972. Any issue of prior trustee duty to sue Brauch depended upon his pension payment having been made in breach of a fiduciary duty as an act of "wilful misconduct". The only question then pending and not resolved by the District Court until June 29, 1972 was this very issue (9A). The District Court then cleared the trustees of "any breach of fiduciary duty" for having made the pension payment to Brauch. By that decision, after the Statute of Limitations had run out, the trustees were relieved of any personal liability for not having sought to effect restitution. The pension payment was not "uncollectible" by reason of the Statute of Limitations bar but, prior thereto, by its unenforceability as a legal claim. Consequently, there was no surviving obligation by Brauch to repay, or on the trustees to attempt collection.

Plaintiffs chide the trustees for standing "idly by" and allowing the Statute of Limitations to run against the Brauch claim. Since the claim was unenforceable, the trustees did not proceed for restitution. If plaintiffs were otherwise persuaded, they had the right, if not the obligation, to pursue the claim on behalf of their principals, the member-beneficiaries of the NMU. This they failed to do either initially or within the available time span before the statute ran out.

1—The Court of Appeals correctly decided that the trustees, including Karchmer, were free of wilful misconduct by forgoing restitution proceeding upon the legally unenforceable claim for the 1966 Brauch pension payment.

A trustee acting honestly and with ordinary prudence should not be held liable "for unfortunate results which he could not be expected to foresee . . ." *Ormiston* v. *Olcott,* 84 N.Y. 339, 347. Necessarily, the trustees in making the Brauch payment in 1966 could not be expected to forecast the outcome of litigation commenced only in 1969 and resulting in an adverse decision in 1972.

Further underscoring the uncollectibility of the claim, is the decision of the New York Court of Appeals in *Stark* v. *National City Bank of New York,* 278 N. Y. 388, 400, 16 N. E. 376, 381:

> "In all jurisdictions third parties are held responsible for the loss caused to an estate by transactions with a fiduciary in which they participated with actual knowledge that the fiduciary was committing a breach of trust".

No such foreknowledge is even imputed by plaintiffs either to the trustees or to Brauch.

As the District Court held, and the Court of Appeals affirmed, personal liability of the trustees depended on proof which the plaintiffs failed to provide. It was not even asserted, much less proven, that these payments were made without due care, prudence or diligence or that the trustees could have anticipated their invalidity to be judicially determined years later.

The good faith of the trustees was unquestioned even by plaintiffs on these payments. They met the standards re-

quired of ordinary prudent men unequipped with clairvoyance or the benefits of hindsight. Having met this standard, no breach of trust could be or was found against them for what, in retrospect, was a payment made in good faith reliance on the validity of the 1961 and 1964 amendments, unchallenged until 1969.

A personal judgment against Brauch was an indispensable predicate for imposing a duty upon the trustees to seek restitution thereon—as in the case of Perry. The ignored guidepost available to plaintiffs is set forth by Rule 19 of the F. R. Civ. P. It is self-evident that Brauch was a necessary and possibly indispensable party to the extent of requiring that he be thereby subjected to a personal judgment by a joinder as a defendant.

The general mandate of the Rule is to do equity to the extent possible to all persons concerned. The decision of the Supreme Court in *Provident Tradesmen's Bank & Trust Co.* v. *Patterson* (1968), 390 U.S. 102, 109, 88 S. Ct. 733, 738, 10 L. ed. 2d 936, dealt specifically with the effect of non-joinder of an "outsider" in the position of Brauch —even if not an indispensable and necessary party:

> "Third, there is the interest of the outsider whom it would have been desirable to join. Of course, since the outsider is not before the court, he cannot be bound by the judgment rendered. This means, however, only that a judgment is not *res adjudicata* as to, or legally enforceable against a nonparty."
>
> ". . . When a case has reached the appeal stage the matter is more complex. The judgment appealed from may not in fact affect the interest of any outsider even though there existed, before trial, a possibility that a judgment affecting his interest would be rendered. When necessary, however, a court of appeals should, on its own initiative, take steps to protect the absent party who, of course, had no opportunity to plead and prove his interest below."

In this instance the District Court, as affirmed by the Court of Appeals, protected the interest of Brauch to the degree of not holding him personally liable even though not joined—in that the plaintiffs failed to establish that the pension payment was either made or received in bad faith under the prevailing state of facts in 1966.

Had plaintiffs joined Brauch as a defendant, this decision of non-liability might have been appealable. But plaintiffs elected not to do so and defendants were not so obliged. This foreclosed the plaintiffs from appealing the non-issue. As the Supreme Court further noted in *Provident Tradesmen's Bank and Trust Co.* (*supra*):

> "Fourth, there remains the interest of the courts and the public in complete, consistent, and efficient settlement of controversies. We read the Rule's third criterion, whether the judgment issued in the absence of a nonjoined person will be 'adequate', to refer to this public stake in settling disputes by wholes, whenever possible, for clearly the plaintiff, who himself both chose the forum and the parties defendant will not be heard to complain about the sufficiency of the relief obtainable against them. After trial, considerations of efficiency of course include the fact that the time and expense of a trial have already been spent."

The circumstance that the defendants did not raise below the absence of Brauch and other similarly affected parties as a basis for dismissal is now academic. As held in *Continental Ins. Co.* v. *Cotten* (CA 9th, 1970), 427 F2d 48, however effective a defense of indispensable parties may be at the trial level, it will almost always be too late at the appellate level to cure a defect of parties.

Plaintiffs did not seek specific relief against any of the parties other than Perry for wrongful receipt of pension payments. However, they were obliged to but did not comply with Rule 19(c) of F.R. Civ. P. to provide notice of po-

tential liability to Brauch and others similarly situated. This required plaintiffs to "state the names, if known to the pleader, of any persons as described in subdivisions (a)(1)-(2) hereof who are not joined, and the reasons why they are not joined." Certainly, Brauch and the other non-entitled recipients had an interest in the outcome of the litigation, evident, as here, by plaintiffs' belated attempt to impose collateral liability on the trustees for failure to proceed against Brauch to judgment.

We do not contend that Brauch was an indispensable party in that his absence from the litigation could prevent the court from proceeding to a decree, and do complete and final justice, without affecting other persons not before the court. (*Shields* v. *Barron* (1854), 17 How 130, 15 L. ed. 158). For this is precisely the result achieved by the District Judge in effecting repayment by the trustees to the NMU of $624,222.60, representing contributions for non-eligible participants, held improperly made and received, together with a judgment against Perry, coupled with other corrective relief.

In this case, however, the trust question at issue involving the Brauch payment was whether the plaintiffs could prove by a preponderance of evidence that such payment by the trustees was an act of wilful misconduct and its recipient a knowing wrongdoer. The joinder or non-joinder of Brauch aside, neither condition was proved nor even attempted at trial. All that plaintiffs claim, in effect, is that because the 1961 amendment, under which the good faith payment and receipt occurred, was judicially declared invalid almost six years after the event, a liability automatically evolved upon the trustees regardless of the absence of wilful misconduct.

The District Court reached "a viable judgment having separable affirmative consequences with respect to parties before the court" as was the situation in *Stevens* v. *Loomis* (CA 1st 1964), 8 FR Serv 2d 19b.322 (Case I). There the

First Circuit held the inquiry on appeal to be "concerned solely with the inequities in the light of the total circumstances, resulting from the inability to affect absent interested parties", which parties were therefor defined as "merely necessary, not indispensable."

Plaintiffs, at best, would invite a multiplicity of suits by their neglect of Rule 19. The obvious consequence of holding the trustees chargeable for not seeking restitution of the Brauch payment would open the question of similar accountability for other good faith pension payments to many innocent but subsequently ruled non-eligible recipients.

A complete and final decree was reached on the merits on all questions properly at issue and so determined by the District Judge. The trustee Karchmer was absolved of personal liability on all issues before the court, by plaintiffs' failure to establish his wilful misconduct in any regard. Such determination was just and proper and should be left undisturbed by plaintiffs' belated efforts to cover up their own neglect or belated after-thoughts as to what might or should have been.

CONCLUSION

The Cross-Petition against Leon Karchmer should be denied.

Respectfully submitted,

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BRIEF FOR RESPONDENTS JOSEPH CURRAN AND SHANNON WALL IN OPPOSITION TO THE CROSS PETITION FOR A WRIT OF CERTIORARI

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TO THE HONORABLE, THE CHIEF JUSTICE AND ASSOCIATE JUSTICES OF THE SUPRPME COURT OF THE UNITED STATES:

Respondents, Joseph Curran and Shannon Wall, respectfully pray that the cross-petitioner's application for

a Writ of Certiorari to review the judgment of the United States Court of Appeals for the Second Circuit entered on January 18, 1973, be denied.

Opinions of the Courts Below:

The opinions of the Courts below are adequately set forth in the cross-petition at Page 2.

Jurisdiction:

The jurisdictional requisites are adequately set forth in the cross-petition at Page 2.

Questions Presented:

1. Whether the Supreme Court should grant certiorari to review the findings of fact of the District Court sitting without a jury, unanimously affirmed by the Circuit Court, which held that union officials were not personally responsible in damages for payments made to and by the trustees of an independent pension trust when the union has been made whole for such payments by the trustees, the union officials had no control over the manner and amounts of such payments by the trustees, and relied upon experienced counsel and trustees for the propriety of the payments?

2. Whether the Supreme Court should grant certiorari to review the findings of fact of the District Court sitting without a jury, unanimously affirmed by the Circuit Court, which held that a union is not barred *in futuro* from providing pensions for its employees when it has obtained approval for such pensions from the union membership in accordance with the union's constitution?

Statutes Involved:

The statutes involved are adequately set forth in the cross petition at Page 4.

Counter Statement of the Case:

Plaintiffs are members of the National Maritime Union of America (NMU). Defendants Curran and Wall are the President and Secretary-Treasurer, respectively, of the NMU. Defendants Karchmer, Segal and Freedman are Trustees of the NMU Officers' Pension Plan. Neither defendant Curran nor defendant Wall is a trustee of the Officers' Pension Plan. Defendant Perry is the former Assistant to the President of the NMU.

In 1952 the NMU, pursuant to a provision in its constitution which specifically authorized the establishing of a pension plan for its officers and employees, entered into a trust agreement establishing the NMU Officers' Pension Plan (A50-A61).* As originally adopted, the pension plan provided benefits only for officers of the Union. The plan was administered by three independent trustees appointed for life and not subject to control by the Union's officers (A53). This plan was approved by the Union's membership, which also approved the payments to be made by the Union to the trustees to fund the pension plan (251a-252a).

In 1961, and again in 1964, the pension plan was expanded to provide pension benefits for certain non-officer employees of the Union for whom no other provision for pension coverage had been made.

In May of 1968, plaintiffs served a demand upon the officers of the Union that they take action to recover from the trustees the amounts paid by the Union to provide pensions for non-officers (SA48). The basis of this demand was an amendment to the NMU Constitution adopted in 1960 which provided "All officers shall be eligible for benefits under the NMU Officers Pension Plan. . . ." Plaintiffs

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* References to Petitioner's appendix will be preceded by A. References to the cross-petitioner's supplemental appendix will be preceded by SA. References to the Joint Appendix filed in the Court of Appeals will be followed by a.

contended that this provision operated to limit the coverage of the pension plan to officers of the Union, and precluded its extension to staff employees of the Union.

In January of 1969, William Perry, who was employed as Assistant to the President of NMU, and was one of the non-officers covered under the NMU Officers' Pension Plan, was fired. At the time, Perry had a contract with the Union which guaranteed him employment through 1974. Pursuant to the provisions of that contract, a payment was made by the Union to the pension plan of the amount that would have been paid based on Perry's salary had he continued his employment through 1974, and Perry, in turn, was paid a pension by the trustees based on employment to the end of the contract period.

The instant suit was instituted in February of 1969. The District Court granted summary judgment to plaintiffs, holding that non-officers such as Perry could not be provided with pensions under the Officers' Pension Plan. The Court directed an accounting and the return by the trustees to the Union of all monies paid by the Union to provide pensions for non-officers (SA30-SA31).

The Union then amended its constitution to specifically authorize the inclusion of non-officers in the pension plan and validate the pensions previously paid to non-officers. Plaintiffs moved to have this amendment declared void as an exculpatory provision under Section 501(a) of the LMRDA. The District Court denied this motion (SA33-SA34). Defendants then appealed from the granting of summary judgment against them, and plaintiffs appealed the denial of their motion to declare the amendment exculpatory. The Court of Appeals for the Second Circuit affirmed the grant of summary judgment against defendants, but reversed the District Court's finding that the constitutional amendment was not exculpatory (SA13). The basis of the latter holding was that the amendment would have validated past pension payments (SA11).

On remand to the District Court an accounting was held and the amount which had been paid by the Union to the trustees to provide pensions for non-officers was determined (SA84-SA89). This amount, which with interest totalled $674,222.60, was immediately repaid by the trustees to the Union.

Plaintiffs then initiated a proceeding to surcharge the three trustees and defendants Curran and Wall for the amounts paid out by the trustees to non-officer beneficiaries of the pension plan, including defendant Perry. The District Court dismissed this claim in its entirety as against defendants Wall and Curran finding, first, that since all monies paid by the Union to the pension plan had been returned to the Union, there was no basis for surcharging defendant Union officers as the Union had suffered no loss, and secondly, with respect to the payment to Perry, that there was no evidence that defendant Curran directed or induced the payment to him, or even that he did so indirectly by seeking to impose pressure on any of the trustees (A15-16, A32-33). As to defendant Wall, the Court found that he had acted properly in all respects and did not play any part in either the payment by the Union to the Officers' Pension Plan of the payment based on the Perry contract, or in the payment by the trustees to Perry (A33-A34). These factual determinations were affirmed by the Court of Appeals as follows (A44):

> "Plaintiffs now argue that Curran dominated the trustees and it was through this power that the payment to Perry was made. This is properly a factual question for the district court which ruled on the basis of all the evidence presented that the plaintiffs failed to prove their contention. There is no reason for believing that the ruling of the district court on this question was clearly erroneous.
>
> "The district court held that the evidence established that Wall played no part in the events of Jan-

> uary 16th, and the payment to Perry. There is nothing in the record to indicate that this ruling is incorrect."

After the repayment by the trustees to the Union of the amount found to have been paid to fund pensions for non-officers, the Union deposited a portion of this amount in a separate interest-bearing account with the object of setting up a fund to provide pensions for its current employees who were not otherwise provided with pension coverage. This was consistent with the Court of Appeals prior decision that the amendment to the Union's constitution authorizing coverage of employees was invalid only because the amendment sought to validate retroactively past pension payments. The new pension program that was contemplated would cover only current employees and would not validate past pension payments. A trust agreement was drawn up but was never executed, and no payment was ever made to the contemplated trustee, Mr. Alvin Shapiro. Plaintiffs, however, contended that a payment had been made to Mr. Shapiro, which contention is factually incorrect. Petitioners further argue that it would be improper for the Union to provide pensions in any manner for non-officers of the Union because of the prior ruling that the amendment authorizing past employee pensions was exculpatory. The Court of Appeals rejected both these claims as follows (A44):

> "Plaintiffs' contentions fail for several reasons. First the Union never paid the money to Shapiro; the trust agreement was never executed. Even if the money had been paid, the proposed pension plan for current employees was for future payments. Consequently, the establishment of the fund was permissible and not prohibited by this Court's prior decision."

Petitioner now seeks review, *inter alia,* of the decision below which refused to surcharge respondents Curran and

Wall for the pension payments made by the trustees to defendant Perry and of the decision below which refused to enter judgment for the return of the $460,363 allegedly paid to Alvin Shapiro.

Reasons Why a Writ Should be Denied

I. The Factual Determinations of the District Court, Affirmed Unanimously by the Court of Appeals, that there was No Basis for Surcharging Defendants Curran and Wall is Amply Supported by the Evidence and Raises No Issue which would Warrant Review by This Court.

After numerous hearings in which it had ample opportunity to observe the witnesses, the District Court determined that there was no evidence that either Curran or Wall breached any fiduciary duty (A33, A34). This determination was affirmed unanimously by the Court of Appeals (A35-A45) and plaintiffs' Motion for Rehearing and for Rehearing in Banc was denied (SA45). Under these circumstances, the principle that this Court will not "undertake to review concurrent findings of fact by two courts below", *Graver Mfg. Co.*, v. *Linde Co.*, 336 U.S. 271, 275 (1949), is applicable and dictates denial of a Writ. However, even without this principle, there would be no grounds for granting a Writ in the instant case as the factual findings below were clearly and unequivocally correct.

There was no basis on which defendants Curran and Wall could possibly be held liable for payments made by the Union to the pension plan. First, all such payments have been returned to the Union with interest and, therefore, the Union has suffered no loss for which compensation might be required. Secondly, the evidence showed that all the payments made by the Union to the Trustees had been authorized by the Union's membership (251a-

252a). The basis on which these payments were determined to have been improper was an interpretation of the Union's Constitution on a point of such difficulty that Judges of the Court of Appeals themselves differed on it.* Under the circumstances, as the Court of Appeals found (A43), the defendant Union officers certainly were entitled to rely on the opinion of the Union's general counsel as to the propriety of the payments and could not be subject to surcharge for doing so.

With respect to the payments made by the Trustees to pensioners, including the payment to Perry, it is clear that, under the terms of the Trust Agreement, the Trustees acted independently, and defendants Curran and Wall had no authority to control their actions. Moreover, as both the District Court and the Court of Appeals found, there was no evidence that either Curran or Wall made any attempt to control the Trustees in the performance of their duties as trustees (A43-A44).

The basis on which the courts below surcharged defendant Freedman related to his rendering of a legal opinion. There was no evidence that defendants Wall or Curran had anything to do with this. On the contrary, the District Court specifically found as a fact that ". . . there is no evidence that on January 16th Curran directed the payment to Perry of $222,200 or directed Freedman to furnish such a legal opinion to the Trustees" (A33). On appeal, the Second Circuit affirmed, holding that there was no basis on which it could set aside this factual determination. The Court of Appeals stated (A44):

> "Plaintiffs now argue that Curran dominated the Trustees and it was through this power that the payment to Perry was made. This is properly a factual question for the district court which ruled on the basis of all the evidence presented that the plaintiffs failed

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* See Dissenting opinion of Judge Danaher in *Morrissey, et al. v. Curran, et al.*, F.2d (2nd Cir. 1970) (SA15-SA18).

> to prove their contention. There is no reason for believing that the ruling of the district court on this question was clearly erroneous."

As to defendant Wall, there was not even this slim vestige of an argument to support surcharging him. Rather, the evidence affirmatively showed that Wall knew nothing of the payment in December of 1968 by the Union to the Trustees of the balance due for contributions under the Perry contract, and Wall played no part whatsoever in the events of January 16, 1969 when Perry was fired. As to defendant Wall, the District Court found (A33-A44):

> "Wall, Secretary-Treasurer of NMU, knew that plaintiff had requested NMU to institute action to recover money contributed to the Officers Pension Plan with respect to non-officers. Indeed, he testified that he brought this to the attention of Curran and the NMU lawyers. However, the evidence establishes that he played no part either in the payment of $41,250.01 paid to the Officers Pension Plan on December 18, 1968 or in the events of January 16, 1969. Accordingly, there is no basis for finding that Wall breached his fiduciary duty under the LMRDA."

The Court of Appeals for the Second Circuit affirmed this finding, stating (A44):

> "The district court held that the evidence established that Wall played no part in the events of January 16th, and the payment to Perry. There is nothing in the record to indicate that this ruling is incorrect."

Nothing contained in the petition suggests any basis for rejecting the concurrent findings of the two lower courts. Rather, petitioners merely rehash their misinterpretations of the evidence which the courts below have unanimously rejected. There is not one iota of evidence of any "corrupt labor practices." Rather, the case turned on a close

question of law dealing with the interpretation of the Union's Constitution. The evidence affirmatively showed that all payments made by the Union to the Trustees had been specifically authorized by the Union's membership, and that the only basis on which these payments subsequently were determined to be invalid was in interpretation of the Union's Constitution on which the Judges of the Court of Appeals themselves disagreed. Neither defendants Curran or Wall, nor any of the defendant Trustees, appropriated any Union money to themselves. On the contrary, the basis on which one of the Trustees was surcharged was the Court's disagreement with his legal opinion, and the courts below both found that defendants Curran and Wall played no part in the rendering of this legal opinion.

These determinations by the courts below thus present no issue which would warrant review by this Court.

II. The Courts Below Correctly Rejected Plaintiffs' Contention that Curran and Wall Should Be Surcharged for Payments to Alvin Shapiro as Trustee because (1) No Payments Were Ever Made to Shapiro, (2) The Establishment of a Pension Plan for Current Employees of the Union Was Not Contrary to Any Court Order, and (3) The Proposed Pension Plan for Current Employees Had Been Specifically Approved by the Membership of the Union.

In the courts below, plaintiffs sought to have defendants Curran and Wall surcharged for the amount of $460,363 allegedly paid to one Alvin Shapiro as Trustee, and to enjoin the establishing of a trust to provide pension for certain non-officer employees of the Union. Plaintiffs claimed that the establishment of such a trust and the making of payments to the trust was in violation of the Court's prior order voiding the constitutional amendment which sought to validate the past pension payments. The court below rejected this claim for two reasons: first, no such payment had in fact been made, and, secondly, such pay-

ment and the establishment of the proposed trust would not have been in violation of the Court's order in any event (A44):

> "Plaintiffs' contentions fail for several reasons. First the union never paid the money to Shapiro; the trust agreement was never executed. Even if the money had been paid, the proposed pension plan for current employees was for future payments. Consequently, the establishment of the fund was permissible and not prohibited by this court's prior decision."

In their petition, plaintiffs argue that the Court's factual determination that no payment had been made to Mr. Shapiro was erroneous, and that Judge Hays should have considered other alleged facts which they claim would have required a different result. It is, of course, fundamental that this Court does not grant review merely to determine issues of fact, *United States* v. *Johnston*, 268 U.S. 220, 227 (1925), a principle which is particularly applicable to concurrent factual findings of two lower courts as in the instant case, *Graver Mfg. Co.* v. *Linde Co.*, *supra*. Morever, a review of the evidence demonstrates that the lower courts' factual determinations were manifestly correct.

The background of this aspect of the case is as follows: The Court of Appeals for the Second Circuit, in its initial opinion of February 20, 1970, held that the amendments to the NMU Constitution authorizing the inclusion of non-officers in the Officers Pension Plan were invalid exculpatory provisions because they would have validated past pension payments (SA11). The Court noted, however, that the amendments might not have been invalid "if the provisions were prospective only in their application" (SA11).

As a result of the exclusion of the non-officers from the Officers' Pension Plan, the Union found itself in a situation where many of its staff employees—including people

such as secretaries, maintenance supervisor, research director, controller—were left without any provision for pensions upon their retirement. Since the Court's decision recognized that establishing a pension program for these employees would be permissible so long as it was prospective and did not seek to validate past pension payments (SA11), the Union undertook to create a pension program which conformed to the Court's decision.

On February 2, 1972, the Trustees of the Officers Pension Plan repaid to the Union the sum of $674,222.60 constituting the amount, with interest, that they had received to provide pensions for non-officers. The Union then deposited $460,363 of this amount in a separate interest-bearing bank account *under the control of the Union* (55a-56a). This was the amount that was estimated to be needed to fund the pensions for *current* employees. A trust agreement was drafted naming Alvin Shapiro as trustee, but this agreement was never executed and no monies were ever paid to Mr. Shapiro (55a-56a).

The officers of the NMU then submitted to the membership of the Union for their approval or disapproval the proposed pension program for non-officers. This was done in May of 1972. A memorandum describing the proposed action was prepared, distributed to all offices of the Union and read at all membership meetings in May of 1972. This memorandum provided, in part:

> "The proposed pension program will not validate any pensions previously paid or which have been determined by the Court to have been improperly paid. Rather, the proposed plan is intended only to cover those current employees who are presently without pension coverage." (58a)

This proposal for an employee pension plan received overwhelming approval from the Union's membership

(55a-56a). However, despite this membership approval, the proposed Trust Agreement was not put into effect at that time, and no payment was made to Mr. Shapiro. The funds still are within the control of the Union. Petitioner's statement, in their Petition, that defendant Wall testified that the monies have been paid out is not correct. Wall never so testified.

Since no monies were ever paid to Mr. Shapiro, there could be no basis on which a judgment could be entered directing the return of what was never paid, nor could a judgment be entered against defendants Curran and Wall for payments that were not made. This fact, by itself, was sufficient to require dismissal of this aspect of plaintiffs' claim. However, since plaintiffs seek to create the impression that defendants tried to evade the Court's order, it is also important to recognize, as the Court below held (A44), that the proposed pension plan for non-officer employees is not in any sense a violation of the prior order of the Court of Appeals. Rather, it is plaintiffs, not defendants Curran and Wall, who are misapplying the Court of Appeals' prior decision. Plaintiffs are seeking to interpret the decision that the 1969 amendments were exculpatory as precluding the Union from *ever* providing pensions for its employees, even prospectively, notwithstanding the fact that the membership of the Union authorized such pensions. Nothing in the Court of Appeals' initial decision remotely suggests that the Union was to be barred for all time into the future from providing pensions for its employees. On the contrary, all that was objected to was the validation of past pension payments (SA11), and this the Union is not seeking to do.

Section 501 of the LMRDA never was intended to interfere with the orderly conduct of a Union's business; rather, its concern was that actions of Union officials be properly authorized. Here the required authorization was obtained not once, but several times. There has been no attempt to evade the Court's order; rather, a careful effort to comply

with it and still fulfill the responsibility which the Union has as an employer to its own employees. Thus, the court below clearly was correct in its conclusion that the establishment of a pension plan for current employees was not prohibited by the Court's prior decision, and this determination presents no issue which would warrant review by this Court.

Conclusion:

It must be emphasized that there is no issue of union corruption in this case, nor any misappropriation of union funds to the personal profit of Curran and Wall or defendant trustees. Regrettably, plaintiffs, in their cross-petition have sought to substitute unsupported and scurrilous charges for facts and the truth. These malicious charges are false and without foundation. The case originally turned on an interpretation of the Union's constitution on a close question on which the Court of Appeals panel which heard the case itself disagreed. The subsequent surcharge of one of the trustees related solely to a legal opinion which he rendered. There was no finding of personal dishonesty by any of defendants.

The District Court found, and was affirmed unanimously by the Court of Appeals, that neither Curran nor Wall breached their fiduciary duties under the LMRDA. These findings are amply supported by the evidence and present no issue which would warrant review by this Court.

Respectfully submitted,

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